UNEMPLOYMENT COMPENSATION AND THE FAMILY AND MEDICAL LEAVE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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UNEMPLOYMENT COMPENSATION AND THE FAMILY AND MEDICAL LEAVE ACT

THURSDAY, MARCH 9, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON HUMAN RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:01 a.m., in room B–318, Rayburn House Building, Hon. Nancy Johnson, (Chairman of the Subcommittee) presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON HUMAN RESOURCES

FOR IMMEDIATE RELEASE
March 2, 2000
No. HR–17

CONTACT: (202) 225–1025

Johnson Announces Hearing on Unemployment Compensation and the Family and Medical Leave Act

Congresswoman Nancy L. Johnson (R–CT), Chairman, Subcommittee on Human Resources of the Committee on Ways and Means, today announced that the Subcommittee will hold a hearing on Unemployment Compensation and the Family and Medical Leave Act. The hearing will take place on Thursday, March 9, 2000, in room B–318 Rayburn House Office Building, beginning at 10:00 a.m.

Oral testimony at this hearing will be from invited witnesses only. Witnesses will include State legislators as well as representatives of business, labor, and State Unemployment Compensation administrators. However, any individual or organization not scheduled for an oral appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

BACKGROUND:

On December 3, 1999, the U.S. Department of Labor issued a Notice of Proposed Rulemaking that outlined an Administration proposal to allow States to use Unemployment Compensation funds to provide partial wage replacement to parents on leave following the birth or adoption of a child.

The nature of the American workforce has changed since the Unemployment Compensation program was founded in 1935. Today's workforce contains many more mothers, especially of young children, than at any time in the past. The Family and Medical Leave Act of 1993 (P.L. 103–3), gave opportunities to working mothers and their families by requiring certain employers to provide up to 3 months of unpaid leave to parents of newborn babies and to parents who adopt. The Administration proposal to allow States to use Unemployment Compensation funds would pay a stipend to parents to take such a leave. The proposal does not require States to provide this benefit but leaves it to the States' option. Current rules allow Unemployment Compensation benefits to be paid during training, illness, jury duty, and temporary layoffs.

A basic tenet of the Unemployment Compensation program is that only involuntarily employed workers are covered. Expanding these benefits to voluntarily unemployed workers would represent a major expansion of the program. Any increase in benefits would in the long run use more money than is in the trust accounts that support State programs. To replace these funds, a tax increase would be needed to provide the additional revenue to finance the new benefit. Families rely on unemployment compensation to help them during periods of involuntary unemployment. Any changes to this important system requires careful consideration by Congress in the appropriate legislative process.

In announcing the hearing, Chairman Johnson stated: "The Family and Medical Leave Act has served many families well by giving them opportunities to take time off from work during periods of urgent family or medical need. However, in order to expand this important program, we should not jeopardize another essential public program such as the Unemployment Compensation system. We do not want to pit

out-of-work Americans against their neighbors who have jobs and we do not want to open the nation's Unemployment Compensation system to uses for which it was never intended. Instead, we should have legislation brought before the Congress for open and honest discussion."

FOCUS OF THE HEARING:

The hearing will focus on whether using Unemployment Compensation funds to pay cash stipends to parents taking family leave is good policy and whether using the rulemaking process to impose these changes is appropriate.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Any person or organization wishing to submit a written statement for the printed record of the hearing should submit six (6) single-spaced copies of their statement, along with an IBM compatible 3.5-inch diskette in WordPerfect or MS Word format, with their name, address, and hearing date noted on a label, by the *close of business*, Thursday, March 23, 2000, to A.L. Singleton, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 200 additional copies for this purpose to the Subcommittee on Human Resources office, room B–317 Rayburn House Office Building, by close of business the day before the hearing.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be submitted on an IBM compatible 3.5-inch diskette WordPerfect or MS Word format, typed in single space and may not exceed a total of 10 pages including attachments. Witnesses are advised that the Committee will rely on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.

4. A supplemental sheet must accompany each statement listing the name, company, address, telephone and fax numbers where the witness or the designated representative may be reached. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press, and the public during the course of a public hearing may be submitted in other forms.

Note: All Committee advisories and news releases are available on the World Wide Web at "http://waysandmeanshouse.gov".

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202–225–1721 or 202–226–3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Chairperson JOHNSON. Senator, I know you do have a markup going on. Do we have time to start with our opening statements or do you really need to make your testimony?

Mr. GREGG. Would it be possible for me to give my testimony?

Chairperson JOHNSON. Yes. We will accommodate you.

Mr. GREGG. If it's inconvenient.

Chairperson JOHNSON. Well, it changes the flow, but it's not something that our minds can't grasp.

Mr. GREGG. I don't want to usurp the committee, so, please, proceed however the Chairman wishes to proceed.

Chairperson JOHNSON. I appreciate you coming over, especially when you're in the middle of a markup. Those are important meetings.

So let me thank you for joining us this morning. I appreciate your experience in this area and I'm looking forward to your testimony.

You may proceed. Your entire statement will be included in the record.

Mr. GREGG. Thank you, Madam Chairman, and I appreciate your courtesy. It is very kind of you to allow me to proceed. I do apologize for upsetting the flow of the hearing.

I would like to hear your opening statement, so if you don't mind. Would it be all right?

Chairperson JOHNSON. It would be fine. If you have time, we'd prefer it that way. Thank you very much.

I thank all of our guests for coming this morning to testify at this hearing. We greatly appreciate your willingness to prepare testimony, knowing that it takes a lot of time, and share your views with us.

Let me state plainly that I do not support using the unemployment compensation system to pay cash benefits to parents taking parental leave.

Chairman Archer and I wrote the President last June, when he first announced his decision to allow such payment, to oppose his backdoor raid on the unemployment compensation system. We also wrote to Secretary Herman, responding to the initial draft of the regulations implementing the President's decision.

Although I am a firm supporter of parental leave and voted for Family Medical Leave at a time when it was very controversial in 1993, I cannot support using money intended for unemployed workers to pay benefits to families choosing to take parental leave, especially when no provision for funding those new benefits is being made.

For 65 years, everyone assumed that the unemployment program was intended to help those involuntarily unemployed. All of our thinking about the trust funds, coverage, and the level of benefits was based on the assumption that only involuntarily unemployed workers were eligible for benefits.

To suddenly change such a basic feature of this extremely valuable program, without hearings or providing a source of funding, is shockingly irresponsible. This decision has serious implications for

the unemployment compensation trust fund and for taxes on American businesses and workers.

Any state that adopts this action will spend more money than it currently does on unemployment benefits. If more money is spent from the state trust funds, taxes will be increased. It's a mathematical certainty that if more people get benefits, taxes must be increased. I must point out that I have been very perplexed by the contradictory message on trust fund balances that the Democratic proposal sends.

For years, we have heard from the Department of Labor that trust funds are too low. Now the Department publishes a regulation that would substantially deplete the trust fund of any state that follows the regulation. Is the Department no longer concerned about the balance in state trust funds?

Another consideration is that the implementation of the Family and Medical Leave Act has developed some serious problems, revealed some serious problems with the statute and its regulations. We will have clear and convincing testimony on these problems later in this hearing.

Again, it is simply irresponsible to expand the program without addressing the problems that exist in the program and funding its benefits.

The Family and Medical Leave Act is a vital strand in our domestic safety net. It is a major domestic program that has a long and distinguished history. It deserves thoughtful reform and a process that sincerely addresses the problems that have developed with its functioning, a full consideration of expansion possibilities, and honest attention to the funding required to support expansions.

Administrative fiats, unthoughtful and unfunded, sound good in the political bumper stickers of this world, but they will undermine the unemployment compensation system, which I consider to be one of the most important components of that safety net.

I am disappointed that the Clinton Administration and the Department of Labor has not seen fit to submit legislation that could be considered by this committee and would contain in it some of the solutions to the problems with the current law, as well as a proposal to pay for new benefits.

I will listen carefully to all the testimony today, including testimony in support of the President's policy, because I, too, would like to be able to move in the direction of some paid leave. But bad procedure creates bad law and, frankly, I am, as a legislator and as a public policy person of 23 years experience, outraged to see a political leader proposing expansions without the money to support them and expansions that fly in the face of the fundamental focus and concern and support system that our unemployment compensation system represents in our nation.

So this is an important hearing. We're going to have excellent testimony across the range, and I hope that we will be able to get on the record some of the basic facts, like how many states are still in debt in their unemployment compensation, what is the level of the trust fund. We need some nuts and bolts and we think we have the people here who will be able to provide that information.

Mr. Cardin.

Mr. CARDIN. Thank you, Madam Chair. Let me first thank you for holding these hearings and applaud your leadership on this committee to work in a bipartisan manner. We have produced, I think, some very constructive legislation, working together, Republicans and Democrats.

We disagree on this issue, at least as I've heard you frame the issue for our subcommittee.

Madam Chair, over the last few years, there has been considerable debate on Congress on two issues—helping families raise their children and increasing flexibility to our states in order to deal with these issues and these social programs.

I am, therefore, puzzled by the opposition expressed to a policy that directly promotes both of these goals. After all, we are talking about a regulation that will give states the option—the option of providing unemployment compensation to workers on parental leave. That seems to me very consistent with the policy that we have taken to give our states more flexibility in dealing with the problems in their own community.

Objecting to this policy seems tantamount to opposing the flexibility of states to promote family values.

This is not to say that the unemployment insurance system is necessarily the best mechanism in every state to provide paid leave to workers. States may prefer a different approach to addressing the issue of paid leave, such as establishing temporary disability insurance system.

But for some states, providing unemployment compensation to workers who need time away from work to care for an infant represents a sound investment in the future.

I'm sure, as the Chair indicated, some will question the Department of Labor's authority to implement this change through a regulation rather than through a statutory approach. Let me point out that historically we have used the regulatory approach to make many of the changes in our unemployment insurance system.

For example, the requirement that recipients be able and available for work was established by regulation. States have created numerous exceptions to these requirements over the years, including for individuals who are in training and who are subject to recall by a former employer, or those that are on jury duty.

As our subcommittee considers the proposed regulation allowing states to provide unemployment insurance benefits to workers on leave for birth or adoption of a child, it may be instructive to remember that our nation's workforce has changed dramatically since the unemployment insurance system was created more than six decades ago.

Just consider this one statistic. Ten years after the creation of the UI system, only 12 percent of mothers with young children were in the workforce. Today, that percentage has increase five-fold to 62 percent. It is time for us to look at our UI system to make sure it is meeting the needs of the people in our communities, and those needs are different around the nation and states should have the flexibility to be able to respond to that.

Recognizing the changing nature of the workforce has placed severe strains on families. Congress passed the Family and Medical Leave Act, which guarantees employees in certain businesses three

months of unpaid leave when they become parents. The fact remain that many middle and modest income families cannot afford to go without a paycheck, even for a few months, meaning that they are unable to take time away from work under the Family and Medical Leave Act because they will not have compensation.

The proposed regulation from the Department of Labor allows states to experiment with one more method for helping these parents care for a newly born child or for an adopted child. In short, it allows the states to pay unemployment benefits to workers who are temporarily unemployed through no fault of their own.

Madam Chair, I agree with you, I think these hearings can be extremely helpful to us as we look at our unemployment insurance system, but let me just underscore one point. There are many differences in the status of the funds around the nation. Some states do have problems with solvency, other states don't have problems with solvency.

I don't see a danger in allowing the states to experiment to see whether they can't use the social programs that we have to meet the needs of their community, and I look forward to hearing from our witnesses, particularly our distinguished Senator.

Chairperson JOHNSON. Senator Gregg. It's a pleasure to have you with us morning.

STATEMENT OF THE HON. JUDD GREGG, A UNITED STATES SENATOR FROM THE STATE OF NEW HAMPSHIRE

Mr. GREGG. Thank you, Madam Chair. I appreciate the opportunity to appear before the committee. As I mentioned earlier, I think this is a very important issue. It is an issue which arises on a number of levels in its significance. First off, of course, is the issue of jurisdiction; the fact that the Department of Labor is pursuing an avenue which is clearly reserved for the Congress.

We do have a separation of powers in this nation. We do have the authority to legislate residing in the Legislative Branch, not in the Executive Branch, and what the Department of Labor is attempting to do here is clearly to legislate and, in doing so, is trampling not only on the rights of the Congress, but more importantly, it's treading on the Constitutional rights of citizens who are protected by the separation of power, and that is a critical point which must be considered.

The proposed rule also has a dramatic impact on two very significant pieces of legislation which this Congress spent a lot of time on and has spent a lot of time on and I know this committee has committed huge amounts of time to. One, of course, is the Family and Medical Leave Act and the other is the unemployment insurance laws.

I chair the Senate Subcommittee on Children and Families. We have jurisdiction over the Family and Medical Leave Act, and have held a number of hearings on this bill and in the present way in which the Department of Labor is pursuing the institution of that legislation. We found that there are some significant problems with the Family and Medical Leave Act.

We do feel that the Department of Labor is ignoring these problems and that it has an obligation to address these problems first, before it decides to expand the Family and Medical Leave Act dra-

matically. Some of the problems we've identified are a significant unintended administrative burden, costs to employers, resentment that has grown up in some workplaces by coworkers because the Act has been misapplied, the invasion of privacy by requiring employers to ask deeply personal questions about employees and family members in planning to take their family leave, unnecessary record-keeping and unworkable notice requirements, and conflicts with the existing policies.

These are serious problems which the Family and Medical Leave Act already have and which the Department of Labor, regrettably, is not adequately addressing. Yet, they want to significantly expand the role of the Family and Medical Leave Act in this proposal which they have come forward with.

Unlike the Family and Medical Leave Act, the unemployment laws have been on our books for over 65 years, and the structure of the unemployment accounts are very significant and have a history, a history which is critical to review and which is important in this decision-making process.

The key to it is, I think, to recognize that unemployment insurance is for unemployed people and it is an insurance account which is set up based upon the concept that we would be able to help people out in hard times, as well as good times.

The proposal which comes to us today reflects a good time proposal. The economy is doing well. Yes, the unemployment insurance accounts are, therefore, quite strong. But as a practical matter, this is not a time when the unemployment insurance accounts are at their most critical need. When they are at their most critical need are periods of recession and, unfortunately, as well as we have done for the last ten years, I seriously doubt that we have stepped out of the business cycle as an event in our nation's history, because it has been with us for the 200 years that we have been in existence.

And in fact, the Department of Labor itself recognizes that if we go into another severe recession, say a recession of the nature that we had in 1980 or '82, we would see that over 25 to 30 states would have to borrow 20 to 25 billion dollars from the Federal Government in order to maintain their unemployment insurance accounts.

That means that these accounts are not as strong as you might think they are or as they might appear today, but they are really quite fragile and, in fact, as a governor, which is a job I also had in prior history, I had the regrettable experience of governing my state during the most severe recession, it was actually a depression, that the New England region has gone through in the last 15 years to 20 years, and that was a period when our own unemployment funds throughout New England went into bankruptcy.

Luckily, New Hampshire was able to avoid that type of a bankruptcy, but the other funds did not and they had to come to the Federal Government and they had to borrow money, and as a result, the Federal Government had to bail out the states.

So I think we must recognize that the unemployment insurance accounts play a very unique role in our society. They are there as the buffer during hard times. And to suddenly invade those accounts for the purposes of what may be a good polling initiative, which is the proposal which is being put forward here today, but

for a purpose which has no relationship to the original intent or purpose of the unemployment insurance accounts, is a very serious public policy error.

The unemployment accounts were structured for the purposes of benefiting people who are able and available for work. Now, if you're on family leave, you are not available for work. They were structured for the purposes of assisting people, the unemployment insurance accounts, for people who had been involuntary separated from their jobs, people who had lost their jobs, not because of any conscious decision that they had taken, but because they had unfortunately been put in an economic situation where their job had either been eliminated or where they themselves had simply become unemployed because of a decision that was made by their employer.

A person who is obviously participating in the Family and Medical Leave Act has not involuntarily lost their job. They have, by definition, simply left their job for a period of time, at their own volition, in order to pursue a family decision, which is a very appropriate and good family decision, but which is not tied to unemployment. It is tied to a decision to take a period of leave.

And most people who are on leave in our society today under the Family and Medical Leave Act do receive some sort of compensation from their employer because they are actually on leave.

So those are two very significant legal and structural reasons why we should not cross-fertilize these two programs. The simple fact is that the unemployment insurance accounts are structured for the purposes of benefiting an individual who has lost their job as a result of a separation and who finds themselves still being available for work. The Family and Medical Leave Act, on the other hand, is structured for the purposes of a person who decides, as a matter of their own volition, to take a break from their job in order to raise a family, which is a very reasonable decision, but it is not tied to unemployment.

And it all comes back to the issue of or the question of public policy. The public policy of this government is that we will have unemployment insurance accounts which are solvent, which are available for people during hard times. If we suddenly start using those accounts for other activities, no matter how well those activities may poll or no matter now much they may be a nice way of saying that this is a good purpose to pursue in your life, if we start using the unemployment insurance accounts for other activities than benefiting those people who are unemployed, we will find that we will soon drain those accounts and that we will not have a solvent system as we move into the next recession, which regrettably is inevitably going to occur.

In fact, the Labor Department needs to only look at its own statistics to confirm this position. They can look at what happened in 1982, they can look at what happened in 1991 during the recession then, or they can look at their own projections as to what would happen if we had another recession of the nature either of the '82 recession or the '91 recession, when we know that the insolvencies occurred.

Now, there are some that argue, well, this should be left up to the states and the states should be able to make this decision and

there should be an opportunity for the states to experiment in this area. That argument might make sense and, of course, it's an attractive argument to a states' right person as myself, except for the fact that it is the Federal Government that is the insurer of last resort here. It is the Federal Government that has to come in and protect these unemployment insurance accounts if they are not fully solvent.

So we, the Federal Government, end up paying the bill when these accounts have been drained, which is what will occur of this policy of the Department of Labor is pursued. My suggestion to the Department of Labor is that rather than opening up this brand new drain on the unemployment insurance accounts, that they might want to consider going back an taking a look at their mismanagement of the present Family and Medical Leave procedures and correcting the errors which they are not—which we have now documented in this program, which have created a huge amount of bureaucracy and, unfortunately, some tensions in many working places, and that would be a more appropriate exercise for the Department of Labor.

I thank the Chair.

[The prepared statement follows:]

Statement of Hon. Judd Gregg, a United States Senator from the State of New Hampshire

Madam Chairman, Members of the Committee, first, I want to thank you for extending the courtesy of allowing me to testify on this very important topic—the Department of Labor's proposed rule to expand unemployment insurance for unrelated purposes.

As you know, I chair the Senate Subcommittee on Children and Families which has jurisdiction over the Family and Medical Leave Act (FMLA) and related legislation. I am here today to express my very strong opposition to the administration's proposal.

In issuing the proposed rule the Administration has ignored Congress' actions in the Family and Medical Leave Act area. This thinly veiled back door FMLA expansion circumvents the legislative process and violates the constitutionally protected rights of citizens that we, as elected officials, represent. The proposed rule violates the clear and unambiguous intent of the letter and the spirit of two significant measures passed by Congress: the Family and Medical Leave Act and unemployment insurance laws. Additionally, the rule violates a number of good government regulatory reform laws that Congress has passed that have been specifically designed to stop back door efforts to legislate through the Executive branch.

The Department of Labor is well aware of Congress' continued interest and jurisdiction over FMLA-related issues. In fact, the Department testified before the Subcommittee on Children and Families on July 14, 1999 at a hearing entitled "the Family and Medical Leave Act: Present Impact and Possible Next Steps".

During that hearing we received testimony pointing to the fact that, as implemented by the department of Labor, the Family and Medical Leave Act has resulted insignificant unintended administrative burden and costs on employers; resentment by co-workers when the act is misapplied; invasions of privacy by requiring employers to ask deeply personal questions about employees and family members planning to take FMLA leave; disruptions in the workplace due to increased unscheduled and unplanned absences; unnecessary record keeping; unworkable notice requirements; and conflicts with existing policies.

In addition, the proposed rule states that the proposal has been assessed in accordance with section 654 of pub. L. 105–277, 112 stat. 2681, for its effect on family well being. The DOL concludes that the proposed rule will not adversely affect the well being of the nation's families.

Given the ambiguous nature of the proposed rule and its inevitable misapplication and abuse, we can expect to see an extension of the FMLA's documented negative effect on coworkers and their families. Co-worker resentment and unnecessary litigation have resulted from the Department's confusing FMLA's regulations and in-

terpretations and will be increased by the proposed expansion of unemployment insurance.

Unlike the Department's attempt to manufacture authority to overturn a 65 year old policy requiring persons receiving unemployment compensation to actually be unemployed and not merely on leave, the Department clearly has a responsibility to ensure that the laws within its jurisdiction are being implemented as intended by Congress.

Yet, rather than addressing a single one of these well documented problems, the Department of Labor is now proposing to create more burden by diverting resources away from the unemployment insurance system to pay for persons on FMLA leave. Though perhaps politically expedient, this policy is irresponsible and extremely short-sighted.

The unemployment insurance program is designed to be self-financing. Funds accumulated during periods of economic growth support benefit payments during economic downturns. Because unemployment rates have been low for the past few years, some states (approximately 30) are currently running large surpluses in their UI trust funds. This was the same situation in the 1980s recessions when over half of all states did not have sufficient funds to pay legally mandated benefits. According to a report issued last summer by the Department of Labor, an economic downturn of the magnitude of the 1980–82 recession would force 25–30 states to borrow $20–$25 billion in order to pay UI benefits.

Madam Chairman, as you know I served as Governor of the State of New Hampshire from 1989 to 1993. Though unemployment in New Hampshire was relatively low (6.6%) as compared to other states we still felt the impact of the 1990–91 recession. I had an opportunity to see first hand how important unemployment compensation is to jobless Americans as thousands of New Hampshire residents found themselves without jobs, without any income at all. All they had was unemployment compensation—and that for a limited duration.

During the 1990–91 recession more than half the states depleted their UI reserves and had to borrow from the federal government. Many states had to cut back on their UI benefits and eligibility to keep their unemployment insurance accounts solvent. Congress was forced to pass a 13-week extension of unemployment benefits for people whose benefits had run out. Over 6,000 New Hampshire residents applied for and received benefits under this extension.

In New Hampshire, we were the only northeastern state that avoided insolvency necessitating loans from the federal government to provide UI benefits to workers during the 1990 recession.

This track record was accomplished by asking the Legislature to adjust the tax system when necessary to avoid insolvency. Essentially, we increased the amount of funds that had to be maintained in the trust fund before employers could qualify for a payroll tax discount. This amount was raised twice while I was Governor, and resulted in our being able to maintain a solvent trust fund account without sacrificing benefits to families in need. However, had we been paying family leave benefits at the same time it is very doubtful we would have been able to maintain our benefit levels without borrowing from the Federal Government or significantly increasing employer payroll taxes.

This is what we risk repeating if the Administration has its way. In fact, the Labor Department's own statistics show that if another similar recession occurs, and by most estimates the 1991 recession was relatively mild, states will need to borrow an additional $2–4 billion. If we experience a more severe recession like what we experienced in the 1980s those numbers would increase dramatically.

Madam Chairman, the Administration does not, despite it's contentions to the contrary, have the authority claimed in the proposed rule to re-interpret 65 year old Federal unemployment compensation requirements that individuals be "able and available" for work, to permit providing wage replacement to employees who take approved leave or otherwise leave employment to be with their newborns or newly-adopted children. That decision must appropriately rest with Congress.

The Department of Labor should rather, focus its attentions toward implementing FMLA as originally intended and re-visiting areas where it has created unnecessary confusion and administrative burden on those who are attempting to carry out the letter and spirit of the Act. I urge the Administration to rethink its position in this matter, to include Congress in a significant way in addressing the future of the FMLA and to withdraw the proposed rule.

Chairperson JOHNSON. Thank you very much, Senator. Senator, when were you governor, was there any impediment to you passing a law that would have provided paid family leave and funding it, if you had chosen to do so?

Mr. GREGG. Of course not.

Chairperson JOHNSON. So there is no impediment in Federal law for a state doing this, if they want to do it. The issue here is not whether states can do this. They can. The question is should they be funding family medical leaves, which is a voluntary kind of unemployment, with money that has been explicitly set aside under the law to guarantee benefits to people who are involuntarily unemployed. So there is no impediment right now.

Mr. GREGG. That is absolutely correct, Madam Chairman. It's a succinct statement of it. The states have the rights to, if they want, set up another account which would be able to benefit those people who take a family leave, totally separate from the unemployment insurance accounts, and obviously it should be separate from the unemployment insurance accounts, because you're talking about two entirely different events.

One is a person taking voluntary leave from their job, the other is a person who has involuntarily left their job and is still available for work. In the first instance, the person is not available for work, because they're on leave raising their child.

Chairperson JOHNSON. Now, what did you do? Because you were one of the few, maybe the only New England governor, to avoid bankruptcy insolvency and heavy borrowing in your unemployment compensation system.

You mention in your testimony that you asked the legislature to adjust the tax system in order to avoid insolvency.

Mr. GREGG. We had traditionally in New Hampshire an extremely conservative unemployment insurance fund and we had a very solvent and strong fund going into the recession, which was probably our biggest advantage. It was extremely strong, which is an example of why you do not want to weaken it by throwing other programs into it, which would cause it to be weakened prior to a recession occurring.

The governors can't predict recessions. I'm not sure who can predict recessions, but I can assure you governors can't, nor can state legislatures.

That was our best advantage. We had a strong fund. Then we did have to, unfortunately, raise taxes twice during the period of our downturn in order to keep the funds solvent, but we decided to do that rather than come to the Federal Government.

Chairperson JOHNSON. And once you got through the crisis, did you continue those tax increases or did the legislature then reduce taxes?

Mr. GREGG. I believe the legislatures rolled those back. I left and I suspect somebody took credit for that.

Chairperson JOHNSON. I really commend you on increasing the taxes to fund the benefits. In my estimation, the unemployment compensation system is simply one of the most important pieces of

the safety net we have in America, because it supports hard-working people who are, through no fault of their own, unemployed.

So I commend you on your handling of that crisis. I yield to my colleague, Mr. Cardin.

Mr. CARDIN. Thank you, Madam Chairman. Let me compliment my colleague on his passion on this issue and on the management in his own State of New Hampshire.

I also would like to acknowledge Lynn Woolsey, our colleague from California, who is here today, who has done so much work on this issues of family issues and parents having time with their children, particularly when they are very young, the children are very young.

It's very interesting, Senator, I listened to your testimony and I think we at least need to point out this not new ground. This is not the first time that states have used the unemployment insurance system to deal with problems in our community. We are dealing with involuntary separation and we know that the unemployment insurance system traditionally pays.

But there are many exceptions to involuntary separation that states have used in order to deal with social needs in their community. This is not the first time. In fact, all states have at least some exceptions to involuntary separation. Let me just mention some that are—that some states have recognized and allow that a worker be able to still get unemployment insurance.

A worker who quits following a spouse who has transferred to a new job, in some states, is still considered to be in the labor market. A woman who quits work because of her abusive spouse can be entitled, in some states, to unemployment insurance. A worker who quits to care for an ill parent, who may be forced to relocate, in some states, is eligible for unemployment insurance. A worker who quits to care for an ill child may be considered still available for work because of a shift change that parent must make.

So we have exceptions already in the unemployment insurance law to deal with these types of circumstances. I'm somewhat bewildered by the shock that all of a sudden we are jeopardizing the solvency of our unemployment insurance funds.

Your testimony I hope we will make part of the record of our last hearing of this committee, where we talked about devolving some of the unemployment insurance systems to our states, a proposal that I have very, very serious reservations about, because of the exact reasons that you pointed out in your testimony.

That is, it doesn't take much change in our economy to affect the solvencies of our unemployment insurance funds at the state level and we need to be able to have a strong Federal backstop, whether it's administrative costs or whether it's to be able to deal with extended benefits, to deal with changes in our economy.

You are correct. New Hampshire has been one of the best managed states. Your solvency, I think, ranks number fourth in the nation as far as solvency. But I think you would acknowledge that there is something strange that the United States is the only industrial nation in the world that a parent is not able to get paid leave when they have a child or when they adopt a child.

My daughter hopefully will have a child in the next couple days. She works for an employer that gives her paid leave. If that em-

ployer didn't give her paid leave, it would have had an impact on her staying at home, which I think is true with many parents around the nation.

I don't know why we would want to restrict you, as governor, to decide when you were governor and your legislature to decide that you wanted to follow Mrs. Johnson's suggestion of enacting some form of paid leave requirements, but then you may have run into some problems with your chamber, with the employer saying, gee, maybe we'll move to Vermont rather than New Hampshire because of that mandate at the state level.

Mr. GREGG. And they're not apt to do that.

Mr. CARDIN. Well, maybe it was Maryland rather than Vermont. But why you would want—why you wouldn't want, as a governor, to have the maximum flexibility to deal with the concerns of the people of your own state. There is nothing in this regulation that mandates that New Hampshire need to give unemployment insurance benefits to those that are out because they have adopted or had a child.

But why wouldn't you want to have the full arsenal of opportunities available to you to deal with the problems of the people of New Hampshire? Sounds very Republican to me to allow the states to have full flexibility here.

Mr. GREGG. You've raised a lot of good points, Congressman, from your perspective. Unfortunately, I have a markup and I'm going to have to head off, and I don't want to—but I would like to engage in a debate at some point.

But let me just make a couple points. First, under our studies in our committee, 74 percent of the people who have family medical leave are presently receiving some compensation from their employer. I think that if you set up this new structure, you're going to find that employers pass the buck over to the public insurance and you're going to see an adverse selection process occurring, where basically you basically change the marketplace dynamics so that employers aren't creating—no longer have—

Mr. CARDIN. Experience rating rates, so some of that will be compensated for.

Mr. GREGG. Well, but not really. As you know, you end up with the good employers paying an awful lot of the unemployment insurance and people who are not aggressively participating in the marketplace and may be in and out of the marketplace take advantage of it.

Mr. CARDIN. But they're the same employers that are providing the paid benefits.

Mr. GREGG. So they get hit twice, and that's the problem. I do think you create an atmosphere which is probably going to undermine what has been a fairly significant movement towards employers compensating for family leave, which I think is a good movement, but I think it should be done between the employer and the employee and in the private sector marketplace rather than in the public sector marketplace.

So the question which you asked, which I think is most appropriate to me in my role, is why, as a governor, shouldn't I have this flexibility. Because I, as a United States Senator, end up picking up the bill.

Thank you.

Chairperson JOHNSON. Thank you very much, Senator. I would like to point out, particularly since this hearing is being televised, that this committee has no jurisdiction over the Family and Medical Leave Act. That is under the jurisdiction of another committee.

So we cannot rewrite that law. Our jurisdiction and the purpose for this hearing is to protect the unemployment compensation system. This committee has direct responsibility to assure that there is an unemployment compensation system in place in every state that can fund unemployment compensation benefits, to provide loans when those states run out of money, that then, of course, do have to be paid back, and to share with the states the cost of extended benefits during times of prolonged recession.

So my job as chairman is to guarantee the strength and solvency of our unemployment compensation system. That's why I think it's very important to point out that members of this committee have very different opinions on the Family and Medical Leave Act. I was a very strong advocate of it in 1993 and remain a strong advocate of it, and would like to see hearings that would look at expanding it, but would also deal with the problems.

I dare say I have spent more time talking to employers on factory floors and employees about some of the problems that have developed in this, making it unfair, than most members of Congress, and I'm disappointed that neither the Administration, the Department of Labor, nor the Congressional committee has taken on the nuts and bolts.

This committee has taken on lots of oversight. So far, we have held an in-depth oversight hearing on almost every aspect of the welfare reform bill and have passed major legislation to deal with the problems that developed in the welfare-to-work program that was specifically focused on the people who were hard to place. And as it got out there operating, we found there were problems with it that were preventing it from accomplishing the very goals we intended to achieve.

So we have taken our oversight responsibilities very seriously, and so it is extremely disappointing to me, as chairman, that the Administration didn't have the courtesy to introduce legislation that addressed the problems and opened up the benefits. That's legislative opportunity.

Also, I think it's very important to really note for the record clearly that states can do this. There is no impediment to states doing it.

There is impediments to states doing it with funds that have been raised for the purposes of our unemployment compensation system, which has had a long history of a very focused responsibility.

Mr. CARDIN. Would the gentlelady just yield on that point? I appreciate it.

Chairperson JOHNSON. Yes.

Mr. CARDIN. It is true, the states can pass laws requiring employers to provide paid leave, if they want to, or the state can develop their own program, if they want to, although I would suggest that's extremely difficult with states that border other states,

which is true of almost every state in our nation, to develop this type of a policy.

It's interesting that the regulation that was issued, as I understand, was in response to a request by one of our states to be able to move in this direction. They thought they had the authority to do it and it was questioned as to whether they had the authority.

There's at least two states that were interested in implementing this policy and that the Department of Labor, in response to requests from the states, issued the regulation basically to clarify the authority of the states to be able to implement their unemployment insurance system.

I don't think this was a power grab by the Department of Labor. It was in response to flexibility asked by our states in administering their unemployment insurance laws.

Chairperson JOHNSON. Well, states that do this will certainly be different from adjoining states that don't, no matter what authority they do it under, and we are having this hearing here because there is disagreement with the Department's decision. Some of us feel that it does not reflect the content of the law.

It certainly, without question, does not reflect the legislative background of the law or any of the statements that were made around the law.

So we will proceed with the hearing. I'm very pleased to invite next to the table the Honorable Christopher Donovan, who is a member of the Connecticut House of Representatives. It's a pleasure to have you, Representative Donovan. He is also a co-chair, as I understand it, of the Labor Committee of the Connecticut Legislature.

STATEMENT OF THE HON. CHRISTOPHER G. DONOVAN, REPRESENTATIVE, CONNECTICUT HOUSE OF REPRESENTATIVES

Mr. DONOVAN. Thank you, Chairman Johnson, nice to see you again, and members of the committee.

Chairman Johnson, I want to thank you again for inviting me here this morning. I want to say that I appreciate your candor on the issue and I also appreciate your willingness to listen to us on the issue, as well.

I'm certainly excited that the states and Federal Government are taking a serious look at an issue dealing with one of our, I guess, most precious institutions, which is the family, and—a lot of noises here going on. I would certainly say that precious institution is—time's up already. That precious institution is going through a number of—is under a lot of strain recently.

I guess that goes on forever.

Chairperson JOHNSON. Just ignore it.

Mr. DONOVAN. I'll try to ignore it, thank you.

Chairperson JOHNSON. Sorry. We don't—after the first bell, it means we have 15 minutes to vote. So there will be another series of bells and we will have ten minutes to vote.

Mr. DONOVAN. I'll talk as I can, ma'am.

Chairperson JOHNSON. And when I think that we really have to go, we will suspend the hearing for a few minutes and leave and come back.

Mr. DONOVAN. Thank you. As I said, the American family is under a lot of strain during these times. I hear from young couples who are trying to balance raising children, giving birth to children, tough enough under two incomes, when one of those individuals has to stay home, it's even tougher with a loss of income.

I also hear from those families in so-called sandwich generation who are also dealing with raising their children and also dealing with aging parents.

So what do we do about this strain on our families? Well, it's also an issue of time. Time has become a precious commodity and for a lot of families, they just don't have it.

When I was a kid, Little League was where my family would say go to Little League, get out of the house, we don't want to see you. Now, Little League is I will make an appointment to see you at Little League, if that's what time I will be able to see you.

I think that's a shame. I think it has done harm to that institution and we need to do something about it.

Also, the whole issue of paid family leave and family leave is before us because there is a real need to have time to be with our family members in time of need. Certainly, with the birth or adoption of a new child, we all recognize that that's a time for families to be together, but in some cases, they do not have that ability.

I know a young woman who, after giving birth, she asked her doctor when is she physically able to get back to work after giving birth. The doctor said two weeks. She had to go back to work after two weeks. She did not want to go back after two weeks, but economically that was the only choice she had, to go back to work.

Now, that time with her child cannot be replaced. That's lost. But we can do something about it. Other countries have done something about it. I think the President's proposal has spurred the states to look at what we can do about it. It's not a question, to me, of whether we should do it, but when we can do it and how we can do it.

So as House Chair Labor Committee, I worked with my Senate co-chair and this fall and winter, we held a series of meetings, hearings, a task force that looked at the issue of paid family leave. We heard from a number of groups, we heard from children advocates, women advocates, business communities. We heard from the sterling Professor Ed Zigler from Yale, award winner, considered the father of Head Start, and he told us about the need for families to be together at special times and also the inability of families to be together.

We held hearings. We commissioned the UConn economists and said give us a preliminary estimate of the costs of providing paid family leave. And, finally, we voted out a bill just Tuesday, in our committee, that would provide 12 weeks of paid family leave for families for birth or adoption, as well as for family needs.

As a part of that bill, for the parental needs, birth or adoption, we utilized the unemployment insurance fund as the funding mechanism, the funding stream, and we feel that is appropriate. One of the reasons is, as stated earlier, our state already allows individuals to receive unemployment funds while not looking for work.

As stated earlier, our state allows workers who are temporarily unemployed through seasonal shutdowns to collect unemployment.

According to the State Department of Labor, these seasonal shutdowns, which may last as long as eight weeks, the state does not pursue those workers to find out whether or not they're looking for work. The state assumes that they are not working and not looking for work and the company assumes that they're not looking for work, because the company needs those workers back once the down season is over.

They don't want to lose those valuable workers that they trained to work for them.

We also allow for apprenticeships and job training, workers involved in apprenticeships and job training, to stay on being trained and educated and not find work. We want those workers to be trained and to be able to make a living, a more decent living than they did previous to job training.

Just last year, we passed a law that allows individuals who fear domestic violence to leave their job and collect unemployment. That law was signed by our Governor John Roland and is in place today.

So individuals may temporarily leave the workforce, voluntarily leave the workforce, for non-work-related issues and we would still fund them through unemployment.

Also, we allow for individuals to quit their job and receive unemployment to care for a seriously ill family member, as well as if there is changing in the workplace, that are serious enough to cause disruption in their own lives. For instance, if there is transportation, unrelated to work, ends to a certain area, that individual may be eligible for unemployment.

Also, other industries in our state rely on unemployment as a regular mechanism to keep that industry humming. The construction industry relies on the building trades to be out of work and collect unemployment when the job is done and be available for the next job. Temporary agencies would be devastated without an unemployment fund which pays people while they're not working for the temporary agency.

So we've seen that and our state exemptions reflect some state values that we have. One is we want the workforce to be tied to the business, so we allow for temporary layoffs and we want them to stay connected and just receive benefits for a short period.

We also understand the need for training and how we should make sure that people get the training and not jeopardize that education or to get a better job, and we understand family responsibility and caring for the sick family member, and also family safety by providing for people to take domestic violence.

People talked about our fund. Well, our fund had been in trouble in the years past, but we've set up a mechanism whereby we have instituted a solvency target for our unemployment fund, and I would like to say that we have certainly reached that target.

That target this year is for 448 million dollars. Our fund has in it 838 million dollars. So we have 390 million dollars over the target amount. During the last few years, employers have received unemployment tax cuts of 275 million dollars, almost a little bit less in tax cuts than is in access of the solvency fund.

Also, as unemployment is going down, the experience rates for employers is going down, as well. So employers have seen decreases in their unemployment tax that continue to go down.

Why did we use unemployment insurance, beside the fact that we have the funds available? It's a familiar system to both employers and employees. We don't need to create a new bureaucracy. It's already in place. People are familiar with the procedures, the appeal rights, and it can be easily adapted to add one more exception to the rule in terms of a value that Connecticut holds, which is taking care of our families.

The Unemployment Insurance Compensation Act was passed in 1935, just 15 years after women received the vote, the ability to vote in our country. Congress may have not had family issues on its mind when it put together the unemployment insurance fund, but the Congress did, in its wisdom, create the fund, but left it to the states to administer.

And since that time, the states have implemented different unemployment insurance policy. I think this is another. The pattern has been the Federal Government sets the minimum standards and states may expand on that, and I think the issue of job training is exactly one. States had exemptions for job training. The Federal Government had not. Then the Federal Government adopted it and said all states must have exceptions for job training.

I certainly welcome Congress to address this issue and I will welcome—actually would love to see the Federal Government pass a universal paid family leave system. But as you consider that, don't hold back, I implore you, don't hold back the states that are trying to relieve the strain on our American families and working for proposals that would provide those families with the needed time to be with their children, to be with their family in time of need.

You only ground around this life once and if you miss those opportunities, you'll miss them forever.

Thank you.

[The prepared statement follows:]

Statement of Hon. Christopher G. Donovan, Representative, Connecticut House of Representatives

Good morning Chairwoman Johnson and members of the Committee on Ways and Means, Subcommittee on Human Resources. I want to thank you for inviting me here this morning to provide testimony on the use of Unemployment Compensation funds to pay for family leave benefits.

I am excited that our states and our federal government are taking a serious look at proposals that would provide needed support for our most vital institution. . .the American family. The hardworking, productive American working family is feeling the strain. Young working couples are finding it hard to afford to stay home with their newborns. The sandwich generation is balancing work demands while caring for their children and assisting their aging parents. Time is a precious commodity for American families these days and many just don't have it. No time for the newborn, no time for the ill family member and no time for family life. If one unforeseen problem occurs, the balancing act collapses and misfortune falls on the American family. Loss of wages, loss of a job, loss of a home, loss of precious time with a loved one in their time of need-time that can't be replaced.

We can bolster our American and Connecticut families with a paid family leave system. All of Europe and Canada support their working families and have been doing so for decades. We can too. It's not a matter of should, but it's only a matter of when and how.

In terms of the when. . .it can be now. President Clinton has authorized the Department of Labor to draw up regulations concerning the use of states' unemployment funds for paid family leave. That action has spurred states like Connecticut to consider initiating paid family leave proposals that uniquely fit the needs and economic structures of that state. These states are holding hearings, getting input and looking at possible funding mechanisms and funding streams.

I am honored to serve the State of Connecticut as House Chair of the Labor and Public Employees Committee and recently the committee had the opportunity to listen to Connecticut about the need for wage replacement for workers temporarily leaving the workforce in order to care for a newborn, an adopted child or a seriously ill family member.

We heard from the grandmother worried about her granddaughter having the burden to care for her own children and her at the same time. We heard from the young man who is taking unpaid leave to care for his very ill mother. We heard from the young mother, holding her squirming daughter, about how difficult it was to make ends meet with one income in the family. We heard from experts such as a professor from the University of Connecticut who issued a report on the benefits of paid family leave, and from Dr. Edward Zigler, Sterling Professor of Psychology at Yale, noted child development scholar and nationally recognized as the father of Head Start, who elaborated on the societal benefits of family caring for newborns and the necessity of paid family leave.

And we listened to business leaders who, though open to the idea, were concerned about costs. So we charged economists at the University of Connecticut to provide us with a preliminary estimate of the cost for paid family leave proposals in order to determine the expenses related to such a program. The cost estimate was within a reasonable range of $2.08 to $75 a year per employee. . .the cost of a cup of coffee a week or the cost of paper towels in the company bathrooms.

I am here to report that on Tuesday of this week, having listened to the testimony and studied the reports, our committee submitted legislation and voted favorably to assist Connecticut families by providing compensation for wages lost when taking necessary parental and family leave.

Connecticut House Bill 5619, An Act Concerning Paid Family and Medical Leave, provides up to 12 weeks of wage replacement per year for workers temporarily leaving the workplace after the birth or adoption of a child, for serious illness or to care for a family member with a serious illness. A key provision of this proposal is the use of Connecticut's Unemployment Compensation Fund to provide benefits for workers taking the leave to care for a child following birth or adoption. I have enclosed the legislation with my testimony.

In Connecticut, using our democratic and legislative system, state elected officials voted out a proposal that includes the use of the unemployment fund for workers temporarily leaving the workplace. I believe use of the UI fund is appropriate and reflects both the original intent as well as the ongoing understanding of the purpose of the fund.

Connecticut's unemployment fund already provides benefits for workers who temporarily leave the workforce. For example, companies that have seasonal shut downs must temporarily displace their workers and rely on the unemployment system to sustain those workers until work is resumed. Neither the company nor the administrators of the fund wish those workers to seek other jobs. The company needs those experienced workers and expects them to return. It is understood that the compensation is temporary and that the workers will return to work. *According to the Connecticut Department of Labor any temporary layoff of 6 weeks or less is treated as a recall and workers may collect benefits without looking for work.* Approximately 60,000 Connecticut workers receive benefits for temporary layoff each year. Compare that figure with the much smaller number of workers taking unpaid family leave in Connecticut −20,000.

Here's another example: According to Connecticut law, a worker is not disqualified for unemployment benefits if the worker quits employment to care for a seriously ill family member. However, the workers in this case cannot collect benefits until they are ready, once again, to look for work. This old-fashioned rule leads to the ironic result that while the workers are considered justified in seeking unemployment, they cannot collect it when they need it the most. We make other important exceptions in determining eligibility: Just last year, the Connecticut General Assembly passed legislation, signed by Governor Rowland into law, that permits a worker to quit a job and collect unemployment in order to avoid domestic violence. In neither of these provisions is the employer charged for the claimant's benefit.

Unemployed workers, engaged in approved training or apprenticeships are also permitted to collect benefits and not be required to look for work.

Other industries utilize the unemployment fund as a way of business. The construction industry depends on workers in the building trades collecting unemployment during slow times so that they will be available to work. And the temporary businesses would be decimated without a flexible unemployment system.

Our state recognizes the value of these exceptions. These provisions reflect our state's needs and values: keep good workers linked to their jobs during temporary

layoffs, allow workers to obtain needed retraining skills, reflect family responsibilities and provide for family safety.

Providing unemployment benefits so that a family member may temporarily leave the workplace to care for a new born or adopted child is consistent with other uses of the fund.

But what about drawing on the fund for family leave? Connecticut's fund is solvent and can easily withstand the drawing of benefits for parental leave. According to the Connecticut Department of Labor, the Unemployment Insurance Fund balance as of December 31, 1999 was estimated to be $838 million. The targeted fund reserve, the amount required by law to be maintained in the fund, for the same period was $448 million, leaving $390 million over the target fund reserve amount.

The preliminary estimate on the cost of parental leave is approximately $40 million per year. Given these estimates, Connecticut's UI fund could provide paid parental leave at no cost to Connecticut employers.

In the past few years, Connecticut employers have received big UI tax cuts-approximately $275 million dollars. As the good economy rolls on, experience rates for companies drop as well.

Using the unemployment fund for paid family leave works for Connecticut. It may not work for every state but it is an option we have in our legislation. The UI system is familiar to business and employee. We don't have to create a new bureaucracy. The benefits are clear, the payment system is in place and the overall system can easily be adapted for family leave.

Unemployment Compensation was enacted in 1935, only 15 years after women permitted by our government to vote. But although family issues may not have been on the minds of Congress, it is clear that states were given the authority to administer the fund. Since that time states have initiated many additions to the program. The pattern has been that the federal government sets minimum benefits and the states may expand on those benefits.

Our country needs to support its working families. The choice is ours. Do we ignore our common family experiences and make no room for our newborns, no time for ailing parents or do we develop a system that balances the needs of the workplace with the responsibilities of being a family member?

I welcome Congress to devise such a system. As you consider these ideas, please do not hold back those states, like Connecticut, that are ready to experiment and implement innovative strategies. We believe in and support our hardworking, responsible American families.

Thank you.

STATE OF CONNECTICUT
GENERAL ASSEMBLY
February Session, 2000

Proposed Substitute
Bill No. 5619

LCO No. *2598*

An Act Concerning Paid Family And Medical Leave.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subdivision (4) of section 31–51kk of the general statutes is repealed and the following is substituted in lieu thereof:

(4) "Employer" means a person engaged in any activity, enterprise or business who employs [seventy-five] *fifteen* or more employees, and includes any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer and any successor in interest of an employer, but shall not include the state, a municipality, a local or regional board of education, or a private or parochial elementary or secondary school. The number of employees of an employer shall be determined on October first annually.

Sec. 2. (NEW) (a) Effective July 1, 2001, any individual who (1) meets the monetary eligibility requirements set forth in chapter 567 of the general statutes, and (2) takes a leave of absence from employment (A) in order to care for the spouse, or a son, daughter or parent of the individual, if such spouse, son, daughter or parent has a serious health condition, or (B) because of a serious health condition of such individual, shall be entitled to receive family and medical leave benefits from the Family and Medical Leave Insurance Fund established under section 3 of this act for a maximum of twelve weeks during any twelve-month period, such twelve-month period to begin with the first day of leave taken. For purposes of this section:

(i) "Parent" has the same meaning as in subdivision (7) of section 31–51kk of the general statutes; (ii) "serious health condition" has the same meaning as in subdivision (10) of said section 31–51kk; (iii) "son or daughter" has the same meaning as in subdivision (11) of said section 31–51kk; and (iv) "spouse" has the same meaning as in subdivision (12) of said section 31–51kk.

(b) Except as provided in subsection (c) of this section, the weekly benefit amount of family and medical leave benefits payable to an individual under this section shall be equal to such individual's total unemployment benefit rate, calculated pursuant to section 31–231a of the general statutes, plus a dependency allowance in an amount equal to that provided under section 31–234 of the general statutes, as amended by public act 99–154 and public act 99–1 of the June special session.

(c) Any individual whose weekly benefit payable under this section is less than forty-seven per cent, rounded to the next lower dollar, of the average weekly wage of production and related workers in the state, as determined by the Labor Commissioner pursuant to subsection (b) of section 31–231a of the general statutes shall be entitled to receive a weekly benefit equal to the lesser of (1) one hundred per cent, rounded to the next lower dollar, of such individual's total weekly earnings, or (2) forty-seven per cent, rounded to the next lower dollar, of the average weekly wage of production and related workers in the state, as determined by the Labor Commissioner pursuant to subsection (b) of section 31–231a of the general statutes.

(d) (1) No individual may receive family and medical leave benefits under this section for a week in which the individual receives a wage replacement equal to or greater than the weekly benefit provided by this section under any of the following: (A) Any government program or law, including, but not limited to, the unemployment compensation program established under chapter 567 of the general statutes, the workers' compensation program established under chapter 568 of the general statutes, other than for permanent partial disability incurred prior to the claim for family and medical leave benefits, or under other state or federal temporary or permanent disability benefits law, (B) a permanent disability policy or program of an employer, (C) a temporary disability policy program of an employer, or (D) a paid sick, vacation, family or medical leave policy of an employer.

(2) For a week in which an individual receives a wage replacement less than the weekly benefit amount provided by this section, the individual shall receive family and medical leave benefits equal to the difference between the weekly benefit amount provided by this section and the amount of wage replacement received by such individual.

(e) On or before January 1, 2001, the Labor Commissioner shall adopt regulations, in accordance with the provisions of chapter 54 of the general statutes, to establish procedures and guidelines necessary to implement the provisions of this section, including, but not limited to, procedures for the filing of claims, procedures for hearings and redress and procedures for the periodic reporting by employers to the commissioner of their current experience with leaves of absence taken pursuant to this section.

Sec. 3. (NEW) (a) There is created in the office of the State Treasurer a special segregated fund to be known as the Family and Medical Leave Insurance Fund. Said fund shall consist of all contributions and moneys paid into or received by it for the payment of family and medical leave benefits pursuant to section 2 of this act, of any property or securities acquired from the use of moneys belonging to the fund, all interest earned thereon and all money received for the fund from any other source. All moneys in said fund shall be expended solely for the payment of benefits and expenses provided for by section 2 of this act. The Labor Commissioner shall maintain a separate record of the deposit, obligation, expenditure and return of funds so deposited. The State Treasurer shall be liable on the Treasurer's official bond for the faithful performance of the Treasurer's duties in connection with the Family and Medical Leave Insurance Fund. All sums recovered on any surety bond for losses sustained by the Family and Medical Leave Insurance Fund shall be deposited in said fund.

(b) Effective June 30, 2000, and annually thereafter, the Labor Commissioner shall determine the contribution rate for each employer, except employers that secure family and medical leave benefits for employees in any of the following ways:

(1) By insuring and keeping insured the payment of employment leave benefits with a stock, mutual, reciprocal or other insurer authorized to transact the business of disability insurance in this state, provided the benefits under the policy are at least equivalent to the benefits provided by section 2 of this act and such policy does not require contributions from any employee or class of employees;

(2) By a private plan or agreement that the employer may, by the employer's sole act, terminate at any time, provided the benefits under the plan or agreement are

at least as favorable as the benefits provided under section 2 of this act and the policy does not require contributions of any employee or class of employees; or

(3) By any plan or agreement in existence by agreement or collective bargaining agreement between an employer and an employee organization, provided the benefits under the agreement are at least equivalent to the benefits provided under section 2 of this act and do not require contributions from any employee or class of employees.

(c) All contributions made in accordance with subsection (b) of this section and all other moneys payable into this fund, upon receipt thereof by the Labor Commissioner, shall be paid to the State Treasurer, who shall deposit them in the Family and Medical Leave Insurance Fund.

(d) The State Treasurer, as treasurer of the Family and Medical Leave Insurance Fund, shall, as directed by the Labor Commissioner, requisition from the Family and Medical Leave Insurance Fund such amounts, not exceeding the amount standing to this state's account therein, as the Labor Commissioner deems necessary for the payment of benefits in accordance with section 2 of this act. Upon receipt thereof, the Treasurer shall deposit such moneys in a depository designated by the Treasurer in an account to be known as the family and medical leave insurance account, from which account the Labor Commissioner shall pay the benefits provided by section 2 of this act. The Labor Commissioner shall be liable on the commissioner's official bond for the faithful performance of the commissioner's duties in connection with the family and medical leave insurance account. All sums recovered on any surety bond for losses sustained by the family and medical leave insurance account shall be deposited in the family and medical leave insurance account in the office of the State Treasurer.

Sec. 4. (NEW) (a) In addition to the leave provided in sections 5–248a and 31–51ll of the general statutes, an employee shall be entitled to take unpaid leave not to exceed four hours in any thirty-day period and not to exceed twenty-four hours in any twelve-month period. An employer may require that leave be taken in a minimum of two-hour segments and may be taken for any of the following purposes:

(1) To participate in preschool or school activities directly related to the academic educational advancement of the employee's child, such as a parent-teacher conference;

(2) To attend or accompany the employee's child or the employee's parent, spouse or parent-in-law to routine medical or dental appointments;

(3) To accompany the employee's parent, spouse or parent-in-law to other appointments for professional services related to their care and well-being;

(4) To respond to a medical emergency involving the employee's child or the employee's parent, spouse or parent-in-law; or

(5) To respond to a medical emergency involving the employee's child or the employee's parent, spouse or parent-in-law.

(b) An employee taking leave under this section shall make a reasonable attempt to schedule appointments for which leave may be taken under this section outside of regular work hours. In order to take leave under this section, an employee shall provide the employer with the earliest possible notice, but in no case later than seven days, before leave is to be taken, except when the required seven-day notice could have a significant adverse impact on the family member of the employee.

(c) At the employee's discretion, the employee may substitute accrued paid leave, including vacation, sick and personal leave, for leave taken under this section.

Sec. 5. (NEW) (a) An individual who is on a leave of absence from employment or who has left employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption, shall not be denied unemployment compensation benefits under the provisions of section 31–236 of the general statutes, as amended by public act 99–123, for failing to either apply for or accept available, suitable employment or for voluntarily leaving suitable employment, provided such individual is otherwise eligible to receive unemployment compensation benefits under the provisions of chapter 567 of the general statutes.

(b) Unemployment compensation benefits shall be payable under chapter 567 of the general statutes to an individual who is on a leave of absence from employment or who has left employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption for a maximum of twelve weeks per year. Such benefits shall be in addition to the maximum limitation on total benefits set forth in section 31–231b of the general statutes.

(c) The amount of unemployment compensation payable to an individual who is on a leave of absence from employment or who has left employment to be with the individual's child during the first year of life, or during the first year following

placement with the individual for adoption shall be reduced by the amount of the deductions specified in subsections (g), (h) and (j) of section 31–227 of the general statutes and subdivision (4) of subsection (a) of section 31–236 of the general statutes, as amended by public act 99–123.

(d) Notwithstanding the provisions of section 31–231a of the general statutes, any individual entitled to receive unemployment compensation benefits under this section whose weekly benefit is less than forty-seven per cent, rounded to the next lower dollar, of the average weekly wage of production and related workers in the state, as determined by the Labor Commissioner pursuant to subsection (b) of section 31–231a of the general statutes shall be entitled to receive a weekly benefit equal to the lesser of (1) one hundred per cent, rounded to the next lower dollar, of such individual's total weekly earnings, or (2) forty-seven per cent, rounded to the next lower dollar, of the average weekly wage of production and related workers in the state, as determined by the Labor Commissioner pursuant to said subsection (b) of section 31–231a of the general statutes. Such individual shall not be entitled to receive a dependency allowance under section 31–234 of the general statutes, as amended by public act 99–154 and public act 99–1 of the June special session, if the dependency allowance plus the individual's total weekly benefit exceeds such individual's total weekly earnings.

(e) No individual employer's experience account shall be charged with respect to unemployment compensation paid to an individual who took a leave of absence from employment or who voluntarily left employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption.

(f) Each employer shall post at each site operated by the employer in a conspicuous place, accessible to all employees, information relating to the availability of unemployment compensation to any individual who takes a leave of absence from employment or who otherwise leaves employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption.

(g) Not later than two years following the effective date of this act, the administrator shall issue a report to the Governor and the General Assembly evaluating the effectiveness of making unemployment compensation benefits available to any individual who takes a leave of absence from employment or who leaves employment to be with the individual's child during the first year of life, or during the first year following placement with the individual for adoption.

Sec. 6. This act shall take effect from its passage.

Chairperson JOHNSON. Thank you very much, Representative Donovan. We do only have about five minutes left, so I will just ask one of two questions, and then we'll go. It will take us quite a while, because we have two votes. So it will be about a 20-minute break.

First of all, you mentioned that the law you passed has two parts to it.

Mr. DONOVAN. That's correct.

Chairperson JOHNSON. And only the leave for the birth or adoption of a child would be funded out of the unemployment compensation system. And leave for other purposes would be funded through what mechanism?

Mr. DONOVAN. We would set up a family leave insurance fund, which would be a temporary disability insurance program. We would like—I mean, we—

Chairperson JOHNSON. Would that be funded also through a tax on employers?

Mr. DONOVAN. That would be funded through a tax on employers.

Chairperson JOHNSON. Not general revenues.

Mr. DONOVAN. No. Tax for employers. Our understanding is that given—using the access in the unemployment fund, at this point,

and the estimates from the University of Connecticut, that the parental part of the paid family leave would approximately be 40 million dollars.

So we could implement the paid family leave for birth and adoption at no cost to employers for the next several years.

Chairperson JOHNSON. It's my understanding, I was very pleased to hear that your unemployment compensation fund has reached and exceeded its target. It is, however, my understanding that you still owe the Federal Government 530 million dollars in unemployment compensation loans that you borrowed during the early '90s recession. Is that not true?

Mr. DONOVAN. I don't believe that's true. I believe the state actually took out bonds and paid the Federal Government. So we have a bond.

Chairperson JOHNSON. Okay. I will restate that. You were still paying on the bonds that you took out to repay the loans. So you are still, in a sense, repaying the loan for the early '90s recession.

When will you complete the bond repayments on that loan?

Mr. DONOVAN. My understanding is August of this year.

Chairperson JOHNSON. That's very good. It was originally a 530 million dollar loan, as I understand it. I have really just two short questions. One you'll probably have to answer when you come back.

Did the law you passed address any of the problems that we're seeing in the Family and Medical Leave Act?

Mr. DONOVAN. The law—no, the problems that you brought to us today, we did not address that.

Chairperson JOHNSON. Did you have any testimony on those?

Mr. DONOVAN. We had no testimony on the problems of the current unemployment—the paid family medical leave.

Chairperson JOHNSON. Well, I pride myself on really inclusive testimony, and you will see today that we are covering the waterfront, and I would urge you to hold some hearings and try to clean up the problems in the existing program, because they are really real out there on the floor.

Mr. DONOVAN. Congresswoman, my answer to that is that our hearings, different from this, is that we open it up to everyone, everyone who signs may testify, and—

Chairperson JOHNSON. I can't believe then you didn't hear any of the problems.

Mr. DONOVAN. And I am surprised, as well, and I don't know why.

Chairperson JOHNSON. I'm seeing from some of the witness that they feel they—

Mr. DONOVAN. I just want to say, too, that some of the people who have spoken to me, actually some business people who have come out and—who have come out and opposed it, have pulled me aside and say personally they think it's a good idea.

Chairperson JOHNSON. See, I think that this is not about the concept. This is about the functioning. That's why I'm surprised that you didn't deal with the functioning, because you can't have good policy without a workable system. I see heads nodding when I say did the committee hear about the problems. So I'm disappointed that you didn't actually address the problems as well as new benefits. I'm disappointed in that.

Unfortunately, I now—

Mr. DONOVAN. The policy seems to be working fairly well.

Chairperson JOHNSON.—have one minute left to vote. Now, there's always a two minute grace period, so I know what I can do, but I do have to leave.

Mr. DONOVAN. Thank you.

Chairperson JOHNSON. Thank you.

[Recess.]

Chairperson JOHNSON. Thank you. I apologize for that interruption. My colleague, Mr. Cardin, will be back in a minute. But meanwhile, let me proceed with a couple of other questions. Mr. Donovan, what are the usage statistics in Connecticut?

In other words, we've now had a family leave policy in place for a number of years. What percentage of that leave is being taken for post-delivery for newborns and adoption, how much of it is being taken for other purposes? Could you give us that information?

Mr. DONOVAN. I don't have the actual figures, but I have some round ballpark figures for you. The total number of leaves in our state for family leaves is approximately 20,000 and about a third of those are for birth and adoption.

I just want to add to that, too, is that when I mentioned earlier about people taking temporary or recall unemployment, that figure is 60,000. So three times as many people are on unemployment temporarily under recall than take unpaid family leave.

Chairperson JOHNSON. And the separate fund that's going to fund the Family and Medical Leave Act, with the exception of the birth and adoption, is going to be funded by new tax.

Mr. DONOVAN. Correct, by new tax, and we—

Chairperson JOHNSON. See, I think both Senator Gregg and you are doing the right thing. If you have new benefits, you should provide a new resource for payment of those benefits.

As to the state unemployment comp system, I've been thinking over, during the break, your solvency target of $448 million. It is my understanding that the $530 million doesn't represent the total cost of the recession in the early '90s, but only that part that was eventually bonded by the government.

Mr. DONOVAN. And, again, that will be—

Chairperson JOHNSON. What was the total cost, Mr. Donavan?

Mr. DONOVAN. The bonds that we had will be paid off this August and—

Chairperson JOHNSON. Well, our information, what we were told by the state is that they won't be paid off until November of 2001.

Mr. DONOVAN. I think the last assessment is August.

Chairperson JOHNSON. The assessment, but the actual debt will not be—

Mr. DONOVAN. The last cost to employers will be in August. The last cost to employers will be in August.

Chairperson JOHNSON. I appreciate that, but the debt won't be retired until November. It's odd to me that the last assessment will be in August of 2000 and the debt will not be retired until November of 2001. So I don't know, we'll find out a little more about that.

Mr. DONOVAN. Okay.

Chairperson JOHNSON. But what was the total cost of that recession to—what was the Reserve's and Connecticut's unemployment comp system going into that recession and what was the total cost to the state of that recession?

Mr. DONOVAN. Congresswoman, I don't have those figures. I could get those figures for you. It was previous to when I was at the General Assembly.

Chairperson JOHNSON. I would like to have those. I appreciate that. I appreciate that, but as chairman of the committee, I thought you might know.

The reason I ask that is because if 530 million is the remainder and that's not actually going to be retired to the Federal Government until 2001, it makes your solvency target of 448 million look not as powerful as it sounded to begin with.

I would note that in the President's own budget document, he assumes that the unemployment rate will go up from 4.1 percent to 5.3 percent in the next three years. I don't know whether you have factored any kind of increase in unemployment into your estimates of fund solvency in the course of considering this new benefit. Have you done that?

Mr. DONOVAN. Well, one of the things we have actually simultaneous—there's a couple things going on, Congresswoman, if I may. When we ran into the debt in the early '90s, we instituted a new system that bases our solvency fund, the solvency of the fund on a percentage of total wages. So if that dips below—the fund dips below that, then there is an assessment, and because of that, our fund is at a healthy—

Chairperson JOHNSON. I see. So actually you are funding the extended benefit, the new benefit under the Family and Medical Leave Act through this mechanism of an automatic increase in assessment.

Mr. DONOVAN. Well, actually, there's two things, and it actually relate back to an earlier conversation. Our committee also voted out of committee a legislation that would raise that percentage, understanding that percentage is not—

Chairperson JOHNSON. I see. So you actually are increasing taxes on the unemployment comp fund as well as providing the new taxes to support the new fund.

Mr. DONOVAN. It's a question of whether or not do we need to do the taxes, but we certainly are raising what we can—we're raising the target fund and we want to make sure of their solvency.

Chairperson JOHNSON. You're raising the assessment, right.

Mr. DONOVAN. And I think I'd agree with you, we want this—the unemployment fund to be solvent.

Chairperson JOHNSON. See, that is this committee's concern.

Mr. DONOVAN. Right.

Chairperson JOHNSON. You know, I myself have been a very strong advocate of unpaid leave and I think we should be trying to find a way to do paid leave. But I don't want to erode the trust fund.

And what I hear you now saying is that Connecticut has a mechanism that will automatically increase the assessment if the fund gets below its solvency goal.

Mr. DONOVAN. That is correct.

Chairperson JOHNSON. So even though there will be a greater drain now on the fund, the effect of that will simply be to increase taxes sooner.

Mr. DONOVAN. It's possible. It's possible, absolutely.

Chairperson JOHNSON. It's not possible. Let's be real about this.

Mr. DONOVAN. Well, no, right. If the fund—if the—

Chairperson JOHNSON. If you're going to pay more benefits—

Mr. DONOVAN. If the fund dips below that—

Chairperson JOHNSON.—you're going to need more—

Mr. DONOVAN. Absolutely. If the fund dips below that—

Chairperson JOHNSON. I just think you've got to be honest about this stuff. Okay. Thank you.

Mr. DONOVAN. And if I may, too, the estimates on the costs to employers for this system, the estimates are somewhere around 50 to 75 dollars a year to cover both paid family leave for birth and adoption, as well as family leave. So that's not a whole lot of money in terms of—

Chairperson JOHNSON. I understand there are some questions about those estimates, but I'm delighted to hear that it would be that reasonable.

The other thing I just want to mention, some of us in Congress have been looking very, very hard, because this issue of parents and children is, in my estimation, as one who raised my children and I'm a very, very active and involved grandparent, an extremely important issue in our society.

Mr. DONOVAN. Right.

Chairperson JOHNSON. And my party has been very aggressive in looking at how we change labor law to provide more flexibility, so parents can be home with their kids and actually have time off.

Mr. DONOVAN. I agree.

Chairperson JOHNSON. And be able to schedule far more family hours. And I've been the chief sponsor of legislation that would provide the same subsidy, tax subsidy to families that stay home and take care of their children as we provide to families that pay for out-of-home care, because that portion of the tax law is all income-related.

I want to be sure that the same family earning the same low income gets help to take care of their own children and that we recognize the woman's work at home taking care of those children in the same way we would recognize the cost of her paying someone else to do it. I feel very, very strongly about that.

Now, in your debates about this, as you thought about giving people paid leave, did you think about giving people of the same income also a benefit the first few months they're home with their children? I mean, why should we be neutral when—I mean, I also am prejudiced in this, I have children who have decided to stay home to raise their children, and I can tell you, living on one income when you have four boys is a really, really hard, hard, hard, job, if your husband is in the military, because that's not big salaries.

So did you at all think about giving—you have to do this according to income, because, of course, there's no sense in doing it without regard to ability to pay, but those young families that are making the sacrifice not to work in order to be with their children, are

you giving any thought to how you could give them the same benefit, as well? Particularly under certain incomes.

Mr. DONOVAN. Madam Chairwoman, we did consider that and I guess it's—I guess in the best of all worlds, we would really take a stand and say we want to help every child, but the point is the people who can't afford it right now are the people who are not staying home. The people that can afford it—

Chairperson JOHNSON. See, that, I don't accept that, as a woman. That is not a true statement.

Mr. DONOVAN. There are people—

Chairperson JOHNSON. I do say that I'm glad you thought about it, but I think it's an extraordinary disservice to women and children that we are thinking about this in terms of a workplace issue. It isn't just a workplace issue, it's an income issue. And those young kids who are sacrificing to live on 25,000 a year with babies or 30,000 or 20,000 deserve just as much help and support for those three months as some people where they're working two jobs and between the two of them they're earning 35, 40, 45,000.

Mr. DONOVAN. Our committee also voted out an increase in the minimum wage, too. We're already at 6.15 and—

Chairperson JOHNSON. We're going to do that, too. Absolutely.

Mr. DONOVAN. And we're looking to reach higher. So they can afford it, as well.

Chairperson JOHNSON. But we are going to, and I wish you would follow our lead on this, my boy, we're going to compliment the minimum wage increase with tax breaks for small business, because we don't want them to lay people off, because you don't want to cost jobs for the very people you're trying to help through a higher wage.

So I hope that more states will begin looking at combined packages that compliment these things.

Mr. Cardin.

Mr. CARDIN. Thank you very much, Madam Chairman. Mr. Donovan, it's a pleasure to have you here and I applaud your efforts in the State of Connecticut to try to provide some response to these issues.

It's interesting. There's a lot of good intentions around here and listening to the Chair, the reason we have a marriage penalty today is because we try to provide some relief for families where the non-income-spouse stayed at home. We thought it was only right to try to divide the income.

We provided a bonus basically to encourage or to recognize the economic contributions of mainly the mother, who stayed at home and took care of the child.

We provided a bonus under our tax structure. As a result, we now have a marriage penalty that's causing us all types of grief here in Congress to deal with the unfairness associated with getting married and paying more taxes, where both spouses work.

So we have a lot of great ideas about promoting family values, to make it easier for a family to make the right decision concerning what's best for their family. It's driven, in large part, by economics. You need income in order to be able to raise your family today and the economic realities of our current economy is that in most families, both spouses are going to work.

And how do you deal with that? You want to have a child. How do you deal with that time when that child is born? I'm very proud of the Family and Medical Leave Act that we passed in Congress, but it's unpaid. To the credit of the American employers, most employers provide some form of paid leave. That's good. But many employers do not.

And that's what this is about. It's to try to give the State of Connecticut the ability to deal with the problems in your state. And I do think it's difficult here for us to develop a national policy as to how is the best way to deal with some of these issues. The whole idea of Federalism is to allow the states to try different ways to deal with a problem and then for us to develop national policy as a result of that.

I think I might join Mrs. Johnson in criticizing the Department of Labor and that is, I come at it from a different point of view, Madam Chair, and I'm going to ask unanimous consent that Senator Leahy's letter to the Department of Labor be made part of our record and the Department of Labor's response, because as I pointed out in my comments to Senator Gregg, this came about as a result of states believing they had the authority to do this, they didn't need anything further, they were going to go enact.

They asked the Department of Labor for advice and Department of Labor ruled against them and they had to come up with a regulation in order to give them the authority.

I think I'm going to join with the Chair in criticizing the Department of Labor for that ruling. It seems to me the states had this authority. If a state could, for example, determine that a worker who quits her employment to care for an ill child may still be available for work during a different work shift, could be done without a new regulation or a change in Federal law, why couldn't the State of Vermont move forward and provide unemployment insurance benefits for someone who is out of work because of giving birth to a child.

So we might not have had this controversy here or this hearing here today if the Department of Labor made a ruling that was a little bit more progressive in allowing our states to deal with these issues.

But we are where we are and it's clear that the State of Connecticut wants to take advantage of this additional flexibility. You're moving forward with legislation to deal with that, and I really do applaud you for that.

I know my own State of Maryland is interested in this authority, we know the State of Vermont is interested in this authority. There's clearly an interest out there to use these different tools.

Mr. Donovan, I was very impressed by one statement you made, that this mechanism is already in place. You have an appeal process, you have a way in which the benefits can be given easily. You don't have to set a new bureaucracy. There's no problem with enforcement or making sure the benefits go to the people who are entitled to it.

I mean, you have that structure in place and that has to save you a considerable amount of resources by using the current unemployment insurance system rather than developing a whole new

structure to deal with compensating people who are out on maternity leave.

Mr. DONOVAN. Thank you. And I think, again, that makes sense economically. I would refer to your earlier statement, too, should this—had this ruling not been put out first, we may have put our whole bill under the unemployment system, but this bill was tailored with the proposal before us.

Mr. CARDIN. And you have divided it. You're suggesting, under this authority, that part will go under the unemployment insurance system—

Mr. DONOVAN. That's correct.

Mr. CARDIN.—and some will be using other resources.

Mr. DONOVAN. That's right.

Mr. CARDIN. To deal with it.

Mr. DONOVAN. Yes.

Mr. CARDIN. And that seems to make the most sense for the State of Connecticut. It may not for the State of Vermont or Maryland.

Mr. DONOVAN. It may not, right.

Mr. CARDIN. Thank you very much, Madam Chair.

Chairperson JOHNSON. Thank you. Mr. Foley.

Mr. FOLEY. Thank you, Madam Chairman. How long was the last recession in Connecticut?

Mr. DONOVAN. I don't—I don't know exactly the numbers. I was a participant in it, so I would say it was a number of years, started around 1990 and ended up probably 1996. But I can't—

Mr. FOLEY. And the question posed by the Chair, you are just now getting out of arrearages from paying off that debt to the Federal Government.

Mr. DONOVAN. Actually, just, again, a correction, the state paid that debt off in bonding and actually we're repaying bonds.

Mr. FOLEY. You transferred liabilities. You still have a liability to the system and it took from '95, let's say, when the economy improved, to the year 2000–2001 to satisfy that obligation.

Mr. DONOVAN. There were schedule payments and those payments are following the schedule that was set up, and in the meantime, the employers have seen a 275 million dollar decrease in their unemployment taxes simultaneously.

Mr. FOLEY. Have you looked at projections of how long this economy will last or are you doing the kind of projections most of us in Congress do, it's going to go on forever, happy days are here again.

Mr. DONOVAN. Well, happy days are here again, but also, at the same time, I think the issue here is is family leave important for us and if it—and I say it is. I think families do need to spend time, like every other country in the world pretty much has a system, and how do we then fund that system, and the unemployment fund seems to be an appropriate one, at a cost of—for the family, the parental and—the parental leave, at a cost of, again, somewhere around, I would say, 25 dollars a year per employee.

So if that is funded with—works within the unemployment system, it seems that can be a minor cost that would provide a wonderful, wonderful benefit for the families of the United States.

Mr. FOLEY. You, in your bill, indicate it has to be for employees of 15 or more. Are those under 15 not as important in the family aspect?

Mr. DONOVAN. Actually, it—I mean, again, we tried to pass legislation—and actually there's two parts to that. The 15 or more—currently, as you know, the Federal Government allows—requires employers that have 50 or more employees to provide job protection benefits under family leave legislation. So we go—we include more employees under that protection.

So those employees of 15 or more—employees in a business with 15 or more employees would have job protection under family and medical leave, but we offer the benefits to every employee who is eligible for unemployment.

So whether or not you were in a 15 or more, if you were in a business of less than 15, that individual may say I'm not—it is important for me to be home with my child, I know you can't, say, hold my job, but I need the benefits. So every individual who qualifies for unemployment will be eligible for the benefit, but may not be eligible for the job protection.

Mr. FOLEY. How do you determine the composition of a family? Would a man and woman living unmarried qualify? Would two men living together qualify in domestic partnership?

Mr. DONOVAN. The state has—it would be the definition under the Family and Medical Leave Act, as we determined it, and I'd have to review those statutes. But it's something that's been in place for a while.

Mr. FOLEY. Because it talks about parenting laws, it talks about spouses, it talks about an employee's parent, an employee's child, and obviously today families are different, but they do have children, they may be natural birth children.

Mr. DONOVAN. Right. In terms of family illness, it is someone who is—a family member who—I guess I don't—I don't have the actual statutes in—

Mr. FOLEY. That's what I'm getting at. It's going to be so convoluted. We're trying to expand the benefits. Unemployment compensation, and I'm a former small business owner, was designed for the fact when you have a stalling economy or you lose your job, there is a safety net.

As you expand the pool of those available in the resource, you diminish potentially, in a devastating economic period, the capability of the fund to provide the benefits.

So my concern is when you redefine or add new beneficiaries to the pot of money available, you say 20,000 added to the 60, that's 80, that adds, if you will, a liability to the fund.

Now, I, as the employer, am either going to have to raise rates and let's just say in two years, due to the new internet economy that everybody's praising, Connecticut suffers tragic job loss, because everybody's doing it on the internet, nobody is going to the mall, the retail stores, they're all Yahoo.com, excitedly buying products and not shopping in the malls.

You have a huge layoff. You now have an added burden of additional categories added to the list and I'm not certain how you fund it. If it's taken five-plus years to get out of the last recession and pay the benefits, I guess I'm—what concerns me most about all of

us in government, we forget the banking scandal of the late '80s and '90s and assume we'll never have one again, and we forget the recession in the northeast, where I come from, and assume now that we've got a few bucks extra, we can do all these wonderful things.

Well, someday soon we are probably going to see the market drop well below 10,000, maybe 8,000, layoffs will be certain, and all of a sudden, the funds that had so much solvency will now be in arrearance, and you, as a member of the legislature in Connecticut, are going to have to rapidly raise rates, borrow more money, put your own debt rating in crisis based on those scenarios.

I applaud an attempt to try and find a workable solution, because I agree, there's a problem at home, your family member has a catastrophic illness, you cannot make clear decisions. It's to be at that level which is your most important calling.

But I just want to make certain we set up the right and appropriate mechanism and not put onto a, if you will, already burdened system. Yes, it's flush with cash, but I can remember being in the Florida legislature in '92 trying to figure out how do we make certain we are, in fact, solvent for the next potential recession, and I'm afraid this opens up Pandora's Box and you will have a hard time having your UC company describe for you what is a family today.

Mr. DONOVAN. If I may, on those two issues, and I think that's the beauty of kind of the combination combining family medical leave with unemployment.

Under unemployment, we allow individuals to take time off to care for a seriously ill family member. That is established, it's been working within our state for years. So we know what that is. I don't happen to know it, I'm not the unemployment comp administrator, but we've worked that and it seems to be working fine. I haven't heard any complaints from anybody.

As well as we have the family medical leave, which also deals with family issues, people taking that leave. So that has been working well, too.

So that's the beauty of combining the two in some respects, but thank you, I appreciate your comments.

Mr. FOLEY. Thank you, Madam Chair.

Chairperson JOHNSON. Thank you, Congressman Foley. Mr. McCrery.

Mr. MCCRERY. Representative Donovan, who would administer the program in Connecticut?

Mr. DONOVAN. Under our proposal, it would be administered through the Department of Labor.

Mr. MCCRERY. So through the current unemployment comp offices.

Mr. DONOVAN. That is our hope.

Mr. MCCRERY. Employer services or employee services offices.

Mr. DONOVAN. Correct.

Mr. MCCRERY. Are you not concerned that that's going to add to the administrative burden of the offices that have already been shortchanged by the Federal Government for several years in terms of getting back tax dollars that you send?

Mr. DONOVAN. Certainly, I understand that. As part of the proposal, there will be some administrative funds available to states that utilize the unemployment mechanism, and that would be helpful, but I guess it keeps—and actually, it was funny, flying down here, I met—I was with some representatives of the Department of Education from the State of Connecticut. They're down here looking to see if they can bring some funds back, as well.

So that's always—whenever you see us down here, we're looking for money, and we're trying to bring some of our tax money back. And it is always a concern, but I guess what I just keep coming back to is if this is something that is valuable to our state and country, we need to figure out the best way to do it, and I think doing it through an already established system is better than creating a new one.

Mr. MCCRERY. What percentage of employers in your state currently provide paid leave?

Mr. DONOVAN. Actually, we have asked the industry to give us that. We don't know at this point. And we have, as part of our legislation, if you are an employer that provides paid family and medical leave for your employees that at least match the benefits, then you do not have to participate in the other program. We want to reward those good kind of companies that provide that for their employees.

Mr. MCCRERY. What do you mean you don't have to participate?

Mr. DONOVAN. You don't have to contribute to the other fund.

Mr. MCCRERY. You set up a separate fund to fund this?

Mr. DONOVAN. There's two—because of the regulations, we set up—if I may be clear. For birth and adoption, under unemployment, and other family, serious illness, to care for a serious illness, et cetera, that's done through a family leave insurance fund.

Mr. MCCRERY. Well, if you have a high percentage of employers that provide paid leave, which I suspect you do in Connecticut, are your estimates of costs to the remaining universe of employers take into account that you might have a very small universe of employers that would have to pitch in for this?

Mr. DONOVAN. I don't expect it to be a very small universe of employers. We have a number of large employers that provide benefits, but we also have a larger number of people who do not receive the benefit. So it depends on number of employers versus number of employees.

Certainly, by pooling it, an individual would be able to—that employer would be able to have—would have to pay less for their employees than if they did it on their own. And again, I've said to some smaller employers, if you have a valued employee that you want and you know needs to take a break to be with their family, and you agree with that, you cannot afford, as a small employer, to pay them for 12 weeks of paid leave, but you probably could afford 65 dollars for that employee, which would be the cost of paid family leave for that individual, 65 a year, and that's the cost to them.

Mr. MCCRERY. If that's the cost to an employer and I'm an employer who currently provides paid leave, it seems to me that I'm going to quit providing paid leave and just go under the state program.

Mr. DONOVAN. Certainly, if you—you could do that.

Mr. MCCRERY. It would be a lot cheaper, wouldn't it?

Mr. DONOVAN. It could be cheaper and we have it built in that you could then, as well, add additional benefits, if you desire, above the minimum.

Mr. MCCRERY. So—

Mr. DONOVAN. So it may be a savings to you.

Mr. MCCRERY. Yes, probably. And if so, then you're probably going to have a lot of employers, in fact, most employers saying I'm getting out of the business of providing paid leave and getting under the state program. So essentially you're going to be replacing private dollars that are doing good right now with public dollars.

Mr. DONOVAN. And I would say, I would agree that's true. If every—if private dollars took care of the problem, we wouldn't be here today.

Mr. CARDIN. Would the gentleman yield just on that point?

Mr. MCCRERY. Sure.

Mr. CARDIN. Just so I understand it. The program you're talking about has little to do with the regulation that was issued by the Department of Labor. You're dealing with that part beyond maternity.

Mr. DONOVAN. That is correct.

Mr. MCCRERY. But what the regulation would do is give the option to the states to create a program using the UC system.

Mr. CARDIN. If the gentleman would yield. As relates to a parent for a child, delivering a child or adopting a child, if I understand the Connecticut proposal, it's providing additional paid leave under the Family and Medical Leave Act beyond just giving birth or adopting a child that is not really dealt with in the regulation of the Department of Labor.

Chairperson JOHNSON. Just to clarify—

Mr. MCCRERY. It's the same concept, though.

Chairperson JOHNSON. Just to clarify, they do have a two-tiered program, and so the benefits that are not related to birth or adoption are paid for now with a new program that has come out of the committee and funded by new tax. And what I hear you saying, Mr. Donovan, is that an employer who already pays those leaves would not have to pay that new tax.

Mr. DONOVAN. That's correct.

Chairperson JOHNSON. I think Mr. McCrery's point is he'd be dumb not to pay the tax, it's a lot cheaper than paying the benefits.

Mr. DONOVAN. And that's—

Chairperson JOHNSON. Right. But I think the other half that Mr. McCrery is getting at is the half that pays the unemployment—that makes the payments for the paid leave for birth. That's a third, according to you, of the people who use paid leave.

For that, the employer cannot avoid the increase in unemployment tax that will come from the increased demand for benefits.

And so he would really almost have to stop his own paid leave program because he's going to be paying through the state for the state paid leave program. So you're really forcing anyone, in their right mind, especially an employer of 16, 17, 18, 19, 20 and 30 employees, to get out of any paid leave program they already have.

Mr. CARDIN. Again, just to complete that, if I might, just for one minute, I'd like to have you respond, if the gentleman would continue to yield.

Mr. MCCRERY. Sure.

Mr. CARDIN. If the regulation were not issued and you did not have the authority to use the unemployment insurance system, following the Chair's initial comment, Connecticut could still move forward with this program under the separate tax proposal, including all the benefits.

But then I would suggest the gentleman's comment from Louisiana is accurate, almost all employers may very well drop all of their paid maternity benefits and go into the new state program, and I question whether that's good or not, but it would be up to Connecticut to make that judgment, as is Connecticut now under the new authority offered by Department of Labor has decided to use some unemployment insurance and some separate program.

Mr. DONOVAN. Right. Now, if I may generalize, those employers that pay a good wage to their employees also pay—have good health insurance and also provide paid leave benefits. It's the businesses that maybe can't afford a decent wage or higher wage, cannot afford medical benefits and maybe cannot afford to provide paid leave, but understand that these are important issues for our country and our families, and maybe a universal system for those companies where they can afford it for those employees would be a good thing.

Mr. MCCRERY. I just to conclude. That's the question.

Mr. DONOVAN. Yes, sir.

Mr. MCCRERY. And you make my point. I think that is exactly what Connecticut would end up with, is a universal system funded through the tax system, rather than employers providing benefits for their employees in order to make their place of work competitive and attractive to potential employees, and that is a fundamental question that I think you need to think about.

Mr. DONOVAN. Thank you.

Chairperson JOHNSON. Mr. Camp.

Mr. CAMP. Thank you, Madam Chairman. I just want to take a minute and associate myself with your remarks, particularly on the area of stay at home spouses, that I think we have a growing inequity there and I think we have to watch that very carefully.

But my main point I'd like to make is I am concerned about the integrity of the unemployment compensation trust fund under this proposal, and the reason is I come from a state, I come from Michigan, we have a cyclical economy and my district is about the size of Connecticut.

So we have a much larger state, a much more complex state, I think, in terms of its economy, and we have had a cyclical economy there in the '50s, in the '70s and the in the early '80s. And under Federal law, when unemployment rates go very high and the trust funds are depleted, you're required to borrow money. Our state had to borrow 2.6 billion dollars, mandated by Federal law.

It took us years and a change of administrations to get out of it. We're finally out of it and we have a surplus in our fund.

But I worry about the integrity of this fund, which was created to help those who were involuntary unemployed, and that eroding

it, however positive and well meaning your intentions, could jeopardize not only the people who find themselves unemployed, but if we get into bad times, would require then states to borrow money and then higher taxes on employers and job creators, and, therefore, less jobs being created.

I think it is a very—I mean, I think we have to have a real concern here and not just do the feel good stuff, which we all admire and I think it's great there is a debate going on here, but I am very concerned about the integrity of these very important funds.

We've seen bad times in our country and in our states and Michigan is one that is very cyclical and I just want to make that comment, that I think we have to be very concerned about it.

Chairperson JOHNSON. Well, I thank you for your testimony, Representative Donovan. I am pleased that you have funded both sets of benefits. It would be better if they were all funded under the same plan so people could see that.

Mr. Camp's comments about the erosion of the fund are our concern. Since you have an automatic tax increase, it will be less of a problem in Connecticut, but not all states have that, and not all states raise taxes when their unemployment fund goes belly up.

If we could guarantee that every state that was going to expand their fund would expand their taxes, that would be a different matter, but that has not been the history in this area and our concern is with the solvency of the fund.

I know you have an Office of Fiscal Analysis, having been one of the legislators in the State Senate that helped create it many years ago. Have they done a fiscal note on your bill yet?

Mr. DONOVAN. Madam Chairman, no, they have not. The bill, as you remember, the way that we do it here, the bill goes out of committee, the bill is now sent to the floor of the House and we'll get a fiscal note, and so everybody can see what we're looking at.

Chairperson JOHNSON. If you would be so kind, I would like a copy of that fiscal note, and if you could provide my office with the name of the person in the Office of Fiscal Analysis, because I want to see whether their fiscal note—down here, the fiscal note would say this is the cost and then this is the expected behavioral response and, therefore, the additional cost of the employers who are now providing paid leave, that shift onto the public burden.

So I am very interested in the cost analysis of the Fiscal Analysis Department.

Mr. DONOVAN. I'll be happy to get that to you.

Mr. CARDIN. If I might, Madam Chair, just very briefly, particularly with Mr. Camp still here. I think we all share the same concern about the solvency of the unemployment insurance funds and the unpredictability of what could happen in the future.

That's why we've had a hearing just last week on Mr. McCrery's legislation to devolve the administrative issues. I expressed concern at that hearing mainly because I think you need to have a stronger backstop at the Federal level to deal with extended benefits and to deal with the administrative costs when the states are not going to be able to deal with it during a recession.

But Mr. Camp raised a very interesting point about the State of Michigan. Well, Michigan has cut its taxes on its employers because of the fund's balances. According to the information we have,

the overall unemployment insurance cost for Michigan businesses has been cut by 750 million over the last five years. So it's one thing to say that you're interested in preserving the solvency of the trust fund.

It's another thing to say that states are taking action to reduce the burdens on employers, properly so, properly so because we're going through a strong economic period, and the reserves are getting larger and larger. I don't disagree with that.

We are getting close to repealing the .2 percent FUTA tax here for the same reasons. That's understandable. But to say that providing benefits for people who are taking care of a newborn child is all of a sudden going to create the insolvencies of our trust funds, I think, is just taking this a little bit too extreme, and I applaud the State of Connecticut and Mr. Donavan for your efforts, and I think it's very interesting.

The part that's under the unemployment insurance is not a discretionary program for the employer. The employer can't opt out of that. So Mr. McCrery's point about employers dumping their benefits in order to get into a new state program, they can't do that on the unemployment side. They have to stay within the unemployment insurance side.

I expect that's one of the reasons why Connecticut wants to use the unemployment insurance system for the benefits for a newborn child or an adopted child, because that is going to be uniform for all employers. It's also rate-sensitive to experience, so you are rewarding those employers that have paid maternity leave.

So I guess it's difficult for us sitting in Washington to find a solution. I go back to the whole concept of Federalism. Way back when, when President Reagan—during President Reagan's years, I served on a national commission, as a state legislator, I might say, on the National Commission on Federalism. At that point, we pushed very heard to allow states to have the ability to try new programs, to try new ways to deal with problems that are in our community.

We have a changing society. Why are we so afraid of giving the states the ability to experiment? That's the whole concept of our country.

So, Mr. Donovan, I thank you for taking the time. I know you're in session, and so you gave up some votes in the Connecticut Legislature to be here, and I thank you very much, because I thought it was extremely helpful to our committee.

Chairperson JOHNSON. Thank you.

Mr. DONOVAN. Thank you.

Chairperson JOHNSON. And I am pleased that actually this hearing demonstrates that Federalism works, that you can set up this independent family leave program and you could have easily put the other benefits into it. From a national perspective, there are grave dangers in how states might do this.

It is my pleasure to call next our Deputy Assistant Secretary of Employment and Training, Raymond Uhalde, the U.S. Department of Labor. Thank you for being with us, Mr. Secretary. And you have with you Ms. Kilbane.

Your testimony will be entered in the record in its entirety, and we look forward to your comments.

STATEMENT OF RAYMOND J. UHALDE, DEPUTY ASSISTANT SECRETARY, EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Mr. UHALDE. Madam Chair and members of the subcommittee, thank you very much for this opportunity to testify on the proposed birth and adoption unemployment compensation experiment, a proposed rule change designed to permit interested states to experiment with using the unemployment compensation program to provide partial wage replacement to parents on leave following the birth or adoption of a child.

Within the Department, Madam Chair, we refer to this as Baby UI, so if I slip into that verbiage during the testimony, I apologize.

The Department of Labor believes this proposed experiment is important to parents trying to balance work and family responsibilities. As you know, the Department published a notice of proposed rulemaking last December, seeking comments on this proposed experiment from all interested parties.

In the interest of time, I will go directly to the discussion of the proposed rule and just point out to the committee that Grace Kilbane is accompanying me and she is the administrator of the office work for security.

Because of the dramatic changes in the workforce and the economy and the interest among state legislators, worker advocates, members of Congress and the President, the Department has proposed allowing states, that choose to do so, to implement an experiment to use UC as a means for providing partial wage replacement to employees who desire to take approved leave or otherwise leave their employment following the birth or placement for adoption of a child.

To accomplish this, the Department is exercising its authority to interpret Federal unemployment compensation law and specifically is extending its interpretation, that workers be able and available to work in order to collect benefits, to include new parents.

The Department's birth and adoption proposal is designed to test whether expansion of this able and available interpretation to include new parents would promote a continued connection to the workforce for parents who receive such payments.

The initial time period during which a new child is introduced into a home and how that child's care will be assimilated into the working lives of families is critical. It is during this period that secure emotional bonds are formed between children and their parents. It is also during this period that a system of child care, which will foster the parents' availability for work, can be firmly established.

These requirements are universal when any working family has a new child. Addressing these needs is fundamental to helping families flourish and also connected to sustaining a stable workforce.

For the above reasons, the Department believes these parents are an appropriate focus of an experimental extension of the able and available requirements. Due to this experimental nature, the proposed expanded interpretation of the Federal able and available requirements would apply only to birth and adoption UC. This experiment would build on past Department interpretations that said, under certain circumstances, workers need not meet the clas-

sic definition of being "able and available for work" to receive benefits.

For example, all states now treat individuals in training approved by the state agency as meeting the able and available requirements. The rationale for this interpretation is that the best route to a strong labor market attachment for these workers is to acquire new skills through training.

In 1961, the Department interpreted Federal law to permit states to allow workers to participate in training while receiving benefits. This strategy was so successful that the Congress subsequently amended the law in 1970 to accommodate worker training.

Under our proposal, state participation in this experiment is wholly voluntary. A state choosing to implement birth and adoption UC will need to amend its UC law to provide for these benefits. For guidance purposes, the Department developed an optional model of state legislation and a commentary on the model legislation and policy issues. Both were appended to the notice of proposed rulemaking.

The model state legislation is just that, a model, and in most cases, the proposed rule is structured to provide states with the same flexibility they have in other UC program areas.

Some critics of the proposal have argued that Federal law requires UC recipients to be involuntarily unemployed to qualify for benefits and that this experiment violates this requirement by allowing states to provide benefits to individuals voluntarily leaving employment to be with their newborns or newly adopted children.

The Department does not interpret Federal law to require states to disqualify individuals who voluntarily leave their jobs. For example, some states allow the payment of UC benefits to individuals who quit their jobs to accompany spouses who have been transferred to other locations.

Another concern has been raised by some critics about the impact of the proposal on the solvency of the state unemployment trust funds. While the Department is concerned about trust fund solvency and the Department and the Administration have proposed legislation which includes an incentive for states to make progress in this area, we fully expect that a state would be prudent in its decisions and would not enact changes without first assessing the effect on the solvency of its unemployment fund. Each state has the responsibility to assess the cost to its unemployment fund whenever coverage, benefit expansions or tax changes are considered within the UC program.

The NPRM for birth and adoption UC was published in the Federal Register December 3, 1999, with a 45-day comment period. We believe this period was ample because of the simple nature of the experiment, and the relatively short length of the proposed rule. Although, we did receive a number of requests for additional time. Because the proposal was a new one and to accommodate the holiday season, we decided to extend the comment period 15 days, which comports with the President's Executive Order encouraging agencies to allow a 60-day comment period, whenever possible.

The Department received over 3,700 timely responses to the NPRM and we are in the process of reviewing and considering all

the comments. Comments are roughly evenly divided for and against.

We will then draft the final rule and obtain the necessary Administration clearances, a process which we anticipate will allow for publication in late spring.

In closing, we note that state interest in birth and adoption UC proposals continues this year. In fact, bills have been introduced in over a dozen states to implement birth and adoption UC. While not all of these are likely to be enacted, we are very excited about this opportunity to explore new ways to support families, balancing responsibilities at home and at work.

Madam Chair, this concludes my formal remarks and I'll be glad to respond to any questions you or the subcommittee may have.

[The prepared statement follows:]

Statement of Raymond J. Uhalde, Deputy Assistant Secretary, Employment and Training Administration, U.S. Department of Labor

Madam Chairwoman and Members of the Subcommittee:

Thank you for the opportunity to testify on the proposed Birth and Adoption—Unemployment Compensation program—a proposed rule change designed to *permit* interested States to experiment with using the unemployment compensation (UC) program to provide partial wage replacement to parents on leave following the birth or adoption of a child. As you know, the Department of Labor published a Notice of Proposed Rulemaking (NPRM) last December seeking comments on this proposed program from all interested parties. The NPRM generated considerable response from the public.

I will begin by providing some background information which may be helpful to the Subcommittee in understanding why the Department of Labor believes this proposed program is important to parents trying to balance work and family responsibilities.

With me today is Grace Kilbane, Administrator of the Office of Workforce Security.

BACKGROUND

There have been dramatic changes in our society, the economy, and the workforce since the UC program was designed in 1935. One of those changes is the tremendous increase in women who work outside the home. Today, almost 60 percent of mothers with children under the age of one are in the work force. Evidence suggests that children who have bonded strongly with their parents early in their lives tend to be healthier both emotionally and physically. Working parents who are able financially to take leave from their jobs can spend this critical time with their children. Yet, too many parents cannot afford to do so. According to the Commission on Family and Medical Leave's report "A Workable Balance: Report to Congress on Family and Medical Leave Policies," nearly two-thirds of employees who did not take leave to be with their newborns cited lost wages as the primary reason.

According to the International Labor Organization, more than 120 nations around the globe provide paid maternity leave by law. This includes most industrialized countries except for the United States, New Zealand, and Australia. The United States is the only country in the North American continent that does not provide paid maternity leave to its female workers. I do note that six States and territories provide for paid maternity benefits through State Temporary Disability Insurance (TDI) programs.

Interest in expanding the UC program to these workers began to manifest itself in 1997 through bills introduced in several State legislatures on a wider issue of family and medical leave benefits within the UC program. Interest was also expressed by members of the Congress and worker advocates. Accordingly, the Department of Labor began to analyze whether we could expand our interpretations of UC laws to accommodate State interest in providing such benefits.

On May 23, 1999, in a commencement address at Grambling University, the President announced that he would be asking the Secretary of Labor to propose regulations allowing States to use unemployment fund moneys to provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child, and an Executive Memorandum to this effect was issued on May 24, 1999.

The Department of Labor has proposed allowing States that choose to do so to implement an experimental program to use UC as a means for providing partial wage replacement to employees who desire to take approved leave or otherwise leave their employment following the birth or placement for adoption of a child. To accomplish this, the Department is exercising its authority to interpret Federal UC law, and specifically is extending its interpretation that workers be able and available to work in order to collect benefits to include new parents. The Department of Labor's proposed experimental Birth and Adoption-UC program is designed to test whether expansion of this able and available interpretation to include new parents would promote a continued connection to the workforce for parents who receive such payments.

As the number of families with both parents working rises, the need to test this interpretation increases, and collecting data under the Birth and Adoption-UC program to test the existence and magnitude of this group's connection to the work force, is increasingly important. Indeed, much in the same way that providing training to laid-off workers enhances their connection to the workforce by making them more marketable, the Department of Labor wants to test whether providing parents with Birth and Adoption-UC at a point during the first year of a newborn's life, or after placement for adoption, will help employees maintain or even promote their connection to the workforce.

The initial time period during which a new child is introduced into a home, and how that child's care will be assimilated into the working lives of the parents, is critical. It is during this period that secure emotional bonds are formed between children and their parents. It is also during this period that a system of child care, which will foster the parents' availability for work, can be firmly established. These requirements are universal when any working family has a new child. Addressing these needs is fundamental to helping families flourish and is also connected to sustaining a stable workforce.

For the above reasons, the Department of Labor believes that these parents are an appropriate focus of an experimental extension of the able and available requirements. Due to the experimental nature of this program, this proposed expanded interpretation of the Federal able and available requirements would apply only to Birth and Adoption-UC.

This experiment would build on past Department of Labor interpretations that said, under certain circumstances, workers need not meet the classic definition of being "able to and available for work" to receive benefits. For example, all States now treat individuals in training approved by the State agency as meeting the able and available requirements. The rationale for this interpretation is that the best route to a strong labor market attachment for these workers is to acquire new skills through training. In 1961, the Department of Labor interpreted Federal law to permit States to allow workers to participate in training while receiving benefits. This strategy was so successful that the Congress subsequently amended the law in 1970 to accommodate worker training.

Other special circumstances under which States may permit unemployed workers to continue to receive UC benefits include jury duty and temporary illnesses during their spell of unemployment. The proposed rule would permit States to test whether these special circumstances should be expanded to individuals on leave following birth and adoption by determining whether payment of UC promotes their connection to the labor market.

Under our proposal, State participation in this experiment is wholly voluntary. A State choosing to implement a Birth and Adoption program will need to amend its UC law to provide for these benefits. For guidance purposes, the Department of Labor developed an optional model of State legislation and a commentary on the model legislation and policy issues; both were appended to the NPRM. Among other things, the model legislation provides for 12 weeks of benefits for eligible parents of newborns and newly adopted children. The model legislation also provides that the costs associated with these benefits be spread among employers, i.e., benefits not be charged to individual employers. The model State legislation is just that—a model—and in most cases the proposed regulation is structured to provide States with the same flexibility they have in other UC program areas.

Some critics of the proposal have argued that Federal law requires UC recipients to be involuntarily unemployed to qualify for benefits and that this experimental program violates this requirement by allowing States to provide benefits to individuals voluntarily leaving employment to be with their newborns or newly adopted children. The Department of Labor does not interpret Federal law to require States to disqualify individuals who voluntarily leave their jobs. For example, some States

allow the payment of UC benefits to individuals who quit their jobs to accompany spouses who have been transferred to other locations.

Another concern that has been raised by some critics is the impact of the proposal on the solvency of State unemployment funds. While the Department is concerned about trust fund solvency, and has proposed legislation which includes an incentive for States to make progress in this area, we fully expect that a State would be prudent in its decisions and would not enact changes without first assessing the effect on the solvency of its unemployment fund. Each State has the responsibility to assess the cost to its unemployment fund whenever coverage, benefit expansions, or tax changes are considered within its UC program.

The NPRM on Birth and Adoption UC was published in the FEDERAL REGISTER on December 3, 1999, with a 45-day comment period. We believed this period was ample because of the simple nature of the experimental program and the relatively short length of the proposed rule, although we did receive a number of requests for additional time. In light of the fact that the proposal was a new one, and to accomodate the holiday season, we decided to extend the comment period 15 days, which comports with the President's Executive Order No. 12866 encouraging agencies to allow a 60-day comment wherever possible.

The Department of Labor received over 3,700 timely responses to the NPRM and we are in the process of reviewing and considering all of the comments. We will then draft the final rule and obtain the necessary Administration clearances—a process which we anticipate will allow for publication in late Spring.

In closing, we note that State interest in the proposed Birth and Adoption UC program continues this year. In fact, bills have been introduced in over a dozen States to implement the program. While not all of these are likely to be enacted, we are very excited about this opportunity to explore new ways to support families in balancing responsibilities at home and at work.

Madam Chairwoman, this concludes my formal remarks. I will be pleased to respond to any questions you or the Subcommittee may have.

Chairperson JOHNSON. Thank you very much, Mr. Secretary. It's a pleasure to have you.

Do you have any national statistics on how many people use the Family and Medical Leave Act?

Mr. UHALDE. My agency doesn't administer the FMLA and I don't have the statistics. We will be glad to supply them for the record.

[The information was not available at the time of printing.]

Chairperson JOHNSON. I think they're very relevant to the issue of what impact this will have on the unemployment compensation funds of the country.

Mr. UHALDE. We have estimates on the cost of birth and adoption to the trust fund—

Chairperson JOHNSON. I'm surprised that you don't know them, when you extended this policy.

Mr. UHALDE. Well, Madam Chair, first of all, the policy is not tied directly to family and medical leave. The issues with regard to birth and adoption will cover populations that are not necessarily in accord with family and medical leave. And we do have estimates for the impact with regard to birth and adoption for this proposal.

Chairperson JOHNSON. In your regulations, did you require states to reflect the additional cost by adjusting their unemployment compensation taxes?

Mr. UHALDE. We don't require the states to adjust uc taxes. The model legislation and the NPRM spoke to the question of the states taking into account the solvency and the issues that they would have to address in order to accommodate this issue.

Chairperson JOHNSON. But you did not specifically say if you're going to expand these benefits, you should raise your unemployment comp taxes to cover the cost.

Mr. UHALDE. No, we did not.

Chairperson JOHNSON. I think that's unfortunate. In the President's budget, he assumes that unemployment will rise from 4.1 to 5.3 percent in the next three years, which suggests that, a cost of, at the minimum, 3.4 billion will have to be assumed by the states.

What will be the additional cost of this new benefit?

Mr. UHALDE. Well, first of all, it obviously depends on how many states are going to take this up.

Chairperson JOHNSON. Yes, but you must have had some guess.

Mr. UHALDE. There is no estimate of knowing how many states will enact legislation. If all states took this up, which is highly unlikely, our estimate is that it would cost less than five percent and closer to probably three percent in terms of benefits, compared to what is currently paid out of the trust fund.

Chairperson JOHNSON. We have been called for a vote, so I'll just be very brief. In a July letter of 1997—

Mr. UHALDE. Yes.

Chairperson JOHNSON.—you noted that, quote, "State laws must contain able and available for work requirements to conform with Federal law" and that benefits will be paid, quote, "only to individuals who are unemployed and who are able to work and available to work." That is certainly the traditional understanding of our unemployment compensation system.

Did the Department change this legal interpretation of the law, which, of course, is your responsibility, after the President issues his Executive Order?

Mr. UHALDE. Clearly, the position that we have now is different than the position—

Chairperson JOHNSON. That's right.

Mr. UHALDE.—the agency had in the 1997 letter. I'd be glad to explain how we got there.

Chairperson JOHNSON. I think the important point is that through Executive Order, there has been a change in the law.

Mr. UHALDE. No, that is not correct.

Chairperson JOHNSON. And I would maintain that level of change—well, you, the Department of Labor is the Federal agency responsible for interpreting the law and in 1997—

Mr. UHALDE. Absolutely, that's our authority.

Chairperson JOHNSON.—you said very clearly that laws must contain—and you denied states the right to do this very thing.

Mr. UHALDE. I didn't.

Chairperson JOHNSON. Well, the Department of Labor did.

Mr. UHALDE. Our interpretation in 1997, as has been termed here before, was the traditional and conservative interpretation of the able and available provisions.

Chairperson JOHNSON. That had governed 65 years of the functioning of the plan.

Mr. UHALDE. That's correct, but it's not without precedent that we have interpreted able and available and involuntary unemployment to operate in other instances. As you've heard from the State

of Connecticut and others, for example, the most telling example is the example with regard to training.

In 1961, the Department, not even by regulation, with the benefit of comment and publication, but, in fact, by a program letter, told states that people in training approved by the state would be considered able and available.

The Congress and the states, over a period of a decade, thought that operated so well that the Congress and the Administration, at that time, enacted law requiring that for all states.

Now, clearly, those workers aren't able and available to go get a job while they're in training. So that doesn't meet the classic definition of able and available.

The important thing was that the interpretation by the Department, subsequently ratified by the Congress, was that these workers would have a better labor force attachment, more likely to work and continue work and have more stable workforce attachment. That is what we are determining here and are testing with this.

We believe and there is some evidence to suggest that parents will have a stronger labor force attachment if they are provided this opportunity.

Chairperson JOHNSON. I certainly do agree with that and that's why some employers who can afford it are providing paid leave. But it is very clear from the course of events that the Department of Labor changed its interpretation of the law as a result of the President's initiative.

Mr. UHALDE. Yes, we did change our interpretation. We were actually party to the discussions in the White House with the President in that change.

Chairperson JOHNSON. It was the President's initiative that changed the law and in the future, I would prefer the Department of Labor, if they believe something is necessary to improve the workplace or unemployment compensation system, that they propose the change in the law, so that we could have been part of directing states, if they adopt this, to clearly make provision for its funding.

Now, because Connecticut has this automatic trigger, it will be clearly funding its benefits.

Mr. UHALDE. That's correct.

Chairperson JOHNSON. It is also unfortunate that Connecticut is a very high cost place to do business, and so I hope they will follow the Congress' lead in offsetting these costs through some other reduction in the cost of doing business.

Mr. UHALDE. But this is not a change in the law. This is a change in our interpretation. It's a different issue.

Chairperson JOHNSON. That's right, but that is—it is a change of one of the fundamental principles that have governed unemployment compensation for 65 years.

Mr. UHALDE. Of which we have done several times.

Chairperson JOHNSON. And you have written this committee, the Department of Labor has written this committee repeatedly about your concern about state solvency.

Mr. UHALDE. Absolutely.

Chairperson JOHNSON. And yet in issuing this regulation, you reserved to yourself no right to review a state's plan before they did

that to be sure that they were not going to make their own position in regard to solvency weaker. You did not reserve that right, and I think that was irresponsible, when we're talking about one of the most fundamental and one of the most important programs to support working Americans.

And to have just issued this regulation, not having the guts to bring a law up here and talk about it with us, to me, was a bad process, results in bad policy, and you've got a bad policy here because you have no power to work with the states to see that they fund a new and additional benefit.

Mr. Cardin.

Mr. CARDIN. Thank you, Madam Chair.

Mr. UHALDE. I'd like to respond.

Mr. CARDIN. Mr. Secretary, I'd be glad to have your response.

Mr. UHALDE. First of all, every state does have an automatic tax trigger. Secondly, states are all the time reducing taxes or expanding benefits by state law and they don't necessarily come and ask the Department's permission first on whether they have to compensate for an expansion on eligibility by enacting taxes.

This is a Federal-state system, where the states have enormous responsibility and authority. We were asked whether or not this met with an interpretation of law and whether states had this authority, and our analysis subsequent to obviously the 1997 letter was yes, we could do that and we could give the states that authority, and they have the taxing authority to compensate for this.

Mr. CARDIN. I obviously agree with your position, but it might have been easier if you just did it by letter than issuing a regulation. It might teach you in the future to act a little faster on these issues and maybe Congress wouldn't have noticed. I don't know. Anyway.

Let me just, if I could, I want to give Mr. McCrery an opportunity before we go vote.

Some of the information I have, I just want to make sure it's correct. I believe it's from the Department of Labor on solvency, which we think is a very important point. The information I have received indicates that you've done a study in four states about how much of the reserves would be needed in order to fund this program.

In Maryland, it was 2.79 percent of the trust fund reserves; Massachusetts, 1.89 percent; Washington, .74 percent; Vermont, .39 percent.

Is that accurate?

Mr. UHALDE. Yes. Those are very, very close to the numbers I have. Yes, sir.

Mr. CARDIN. And it seems to me that you would have annual fluctuations in these trust funds that would exceed that amount. This seems to be a relatively modest amount of the trust fund balances that would be involved in funding the UI program that they chose to expand to include the birth issues.

Mr. UHALDE. Yes, absolutely. These are relatively small amounts of the balances. They are also, when measured against the benefit payouts, are relatively small amounts, and they are amounts the states are very well equipped to deal with in deciding the solvency of the system.

Mr. CARDIN. And the last point I just want to put in the record, it's my understanding that 84 percent of the workers who go on maternity leave will return to their jobs. So this is a situation where a person really wants to return to work.

Mr. UHALDE. Yes.

Mr. CARDIN. With that, Madam Chair, I would yield back the balance of my time, and let Mr. McCrery have a chance.

Chairperson JOHNSON. I do recognize Mr. McCrery.

Mr. MCCRERY. Thank you. We do have to go vote, but quickly, I just want to point out that last week, we had a hearing on devolving the UC system to the states and the Department of Labor was here expressing grave concerns about the status of our trust fund, and this week you have a different view.

Mr. UHALDE. No, I have the same view. It differs by the states.

Mr. MCCRERY. But it is curious. I just want to point out, Madam Chairman, that I think we will have witnesses later today that will give us different estimates as to the cost of this program and that will be interesting to hear.

I think some are estimating that the cost will be far higher than the Department of Labor is predicting, so that will be interesting to hear.

Chairperson JOHNSON. Mr. Secretary, do those estimates take into account the cost shift that's going to occur from the private to the public sector?

Mr. UHALDE. I'm not sure that they do.

Chairperson JOHNSON. They don't.

Mr. UHALDE. I'm not sure. I don't know.

Chairperson JOHNSON. I've forgotten the other—that will have to do for now. I had another question, but we all have to vote.

Mr. MCCRERY. That was such a good point, Madam Chairman. You can quit on that one. Excellent point.

Chairperson JOHNSON. I know what the other question was. Has the Department done any research into some of the problems that are felt in the private sector in implementing this program?

Mr. UHALDE. Implementing?

Chairperson JOHNSON. The Family and Medical Leave Act.

Mr. UHALDE. The Family and Medical Leave Act. My agency doesn't administer that, but I believe we have testified to that—my colleague, John Frazier, before Senator Gregg—and we've been working out the issues.

However, as I understand it, I have not been issued any information central to the birth and adoption segment of family and medical leave.

Chairperson JOHNSON. It is disappointing to me that the Department of Labor of the United States of American didn't have the courage to bring up a bill that funded family and medical leave and corrected some of the problems in the program, which are very, very serious.

If you're there on the floor with small businesses, which I know you never are, because that's one of the problems of bureaucrats in Washington, they don't get it; if you were out there, you would have brought us a piece of legislation. You would have said this is a perfectly normal expansion because of these things and that ra-

tionale could have been public, and these are the problems that have to be addressed.

It is very disappointing to me that my Connecticut people ignored the problems out there and especially when I spent—I meant to mention that when Mr. Donovan was here. I don't know whether he's still here.

But the first person who brought to my attention the seriousness of the problems was the former Democrat mayor of Bristol, Connecticut, now head of the Chamber of Commerce, and he brought it to my attention about eight years ago and it's his state senator who is co-chairman of the labor committee.

Now, why can't you guys listen to the problems, as well as think through the potential? So if you had brought a bill, we could have worked through something that would have actually helped business and given them better resources to comply with, to address the problems that are really important to their people.

Just one last issue. Where do you stand on comp time, the Department of Labor? Do you support the comp time initiative?

Mr. UHALDE. I'll get back to you on that.

[The information was not available at the time of printing.]

Chairperson JOHNSON. My impression is you don't. And with all your rhetoric in this statement about families and helping them to resolve the tension between work and family leave, I'll tell you, I want to know from the Department, in writing, why you do not support a comp time law that only benignly, it's very benign, it just makes it very clear that employers who want to offer comp time, so people can go be with their families or take a day off, that they can do that, and we have not been able to get that through the floor because of the opposition of this Administration.

So I loved all your rhetoric, but let's get it together. Let's be honest about these things. Don't do it by executive act. Bring the bill to the floor and fix the problems in the system, as well as meeting the needs of the people, and meet the needs not just by imposing new money, but by imposing the flexibility that people in their lives need.

Sorry. End of diatribe. I've got to go. But I had to get on the record that I cannot believe that the Department of Labor has been utterly obstinate in looking, but would do this without requiring in the directives that states recognize that new obligations require new funding and you've got to do it.

So thank you for your testimony.

Mr. UHALDE. Madam Chair, I take it you don't want an answer to your statement.

Chairperson JOHNSON. I heard your answer. You're going to tell me the states have the automatic trigger. That's not enough. States need to really think through what the trigger—

Mr. UHALDE. You complimented Connecticut on their automatic trigger.

Chairperson JOHNSON. Right. Because at least most if they had taken out because your directive didn't cover it all and funded it themselves. They could have done the whole thing themselves and had a clearly related new tax for new benefits and government has got to be honest that way. New benefits need a new resource of money and that's what should have happened.

Mr. UHALDE. And the states are not confused about their responsibility to fund benefits.

Chairperson JOHNSON. I hope so. We have to go, I'm sorry. Bye.

Mr. UHALDE. Thank you.

[Recess.]

Chairperson JOHNSON. The committee will reconvene. Mr. Cardin will be with us any moment. If we could have come to the table now our panel. Eric Oxfeld, of UWC–Strategic Services on Workers' Compensation and Unemployment; Kimberley Hostetler, Director of Human Resources Services, Connecticut Hospital Association, on behalf of the Society for Human Resource Management; Maurice Emsellem, Policy Director for the National Employment Law Project; Todd Shimkus, the Vice President of North Central Massachusetts Chamber of Commerce; Jack Wheatley, Director of the Michigan Unemployment Agency.

Also, my colleague Mr. Camp will be back. Unfortunately, we have several hearings going on the Ways and Means Committee, so members have to be several places at once.

We do, with panels, have the lights that show you where you are in your five minutes. Your entire testimony will be entered in the record and after the five minutes, there will be a time during questions for you to enlarge on points that you felt you didn't have time to make.

So if we could start with Mr. Oxfeld.

STATEMENT OF ERIC J. OXFELD, PRESIDENT, UWC-STRATEGIC SERVICES ON UNEMPLOYMENT & WORKERS' COMPENSATION

Mr. OXFELD. Madam Chairman, I'm Eric Oxfeld, the President of UWC. We very much appreciate the opportunity to be here this afternoon and commend you for your leadership in holding these hearings, as well as the hearings about a week ago.

I would like to make just a few points. First, compensating workers who choose to take leave while they are unavailable for work because they are on leave is not, as you have pointed out, unemployment insurance. Labeling paid leave unemployment compensation does not change this fact.

If paid leave is unemployment compensation, what isn't; sick leave, workers' compensation, disability, pensions, vacation? I would like to make one observation, because some of the earlier testimony may have blurred the distinction between someone who quits their job and then can collect unemployment and someone who is unavailable for work.

Although employers don't think it's good policy to pay unemployment benefits to people who quit their jobs for personal reasons, they can collect, it is legal for them to collect unemployment benefits, provided they are actively seeking work and are available for work, unlike people who take leave, who choose to take leave and who, by definition, are not available for work and cannot work, who hold themselves out of the workforce. Important distinction.

Changing the fundamental purpose of unemployment insurance to include paid leave is a decision that should only be made by Congress, not by Department of Labor through rulemaking while Congress is out of session and in direct contravention of both the

Family and Medical Leave Act and the clear understandings behind it, as well as the Federal Unemployment Tax Act.

Using unemployment insurance benefits trust funds to provide paid leave is contrary to both the letter and spirit of the FMLA, as well as the Federal Unemployment Tax Act. As former Representative Pat Schroeder, one of the architects of the FMLA, said during the debate on FMLA, there is no unemployment compensation for people who go out on leave. It was clearly understood.

The Federal Unemployment Tax Act is also clear and unambiguous. It prohibits withdrawals from state unemployment trust funds, except for purposes of paying unemployment benefits. You can only make withdrawals to pay unemployment compensation.

There are a few statutory exceptions to the FUTA, but paid leave is not one of them.

When times are good, the temptation to raid unemployment benefits trust funds in order to provide funding for other valuable and desirable goals unrelated to unemployment insurance is a very powerful temptation. That's why the Federal prohibition in the FUTA against use of unemployment benefit trust funds for other purposes is just as important and necessary today as it was when the system was first established.

I would likeN this situation and I'm a parent myself—the good practice of telling our children to refrain from intoxicating beverages while they are under age 18. We tell them to be responsible and not to do drink alcohol, but we know that the temptation is powerful and that is why we have laws that prohibit the sale of alcohol to minors.

This is an analogous situation. The temptation during good times to use up benefits trust funds for another purpose is extremely powerful.

The Department of Labor's position of trust us to be responsible has been proven to be a mistake as demonstrated by the history of borrowing, which you yourself referred to, and the fact that Connecticut is still paying for its last loan.

Expanding the permissible use of UI to provide paid leave will unquestionably add to the payroll tax burden. Our estimate, if all states do it, will be up to 18 billion dollars a year. That's in addition to the 30 billion we already pay for unemployment insurance, even though we have no unemployment. If we expand it to include all FMLA leave, by our estimate, the total cost will be up to 84 billion dollars, and that's just for the 12 weeks the Department of Labor suggests be provided for parental leave.

Most states, as you know, provide 26 weeks of unemployment insurance benefits, not 12 weeks, and if they provided all 26 weeks, as they would if this was really truly unemployment compensation, it would be much more costly.

By the way, all of these new benefits will be scored in the Federal budget as increased Federal outlays, and I can elaborate on that later, if I have time.

When if UI is expanded to include paid leave when the economic cycle turns, UI trust fund balances will be quickly depleted.

As you will recall from the hearings, and I know I'm out of time, there are many problems in the unemployment insurance system, many of them created by the Federal Government's failure to prop-

erly fund the state administrative agencies. It's why unemployment claims last two weeks longer than they should, why we don't have the resources for reemployment and detection and prevention of fraud.

We believe, as employers, that we need to fix those problems rather than expand the unemployment insurance system to a new and different purpose. We respectfully ask the Congress to use all of the powers available to you to prevent the Department of Labor from pursuing this unwise and unworkable proposal.

I'm here not only for UWC but also wearing another hat, which is the co-chair of the Unemployment Insurance Working Group, set up by SHERM and includes the chamber and the NAM, the NIFB, and many other business organizations, all of whom are opposed to this proposal.

We thank you for the opportunity to be here.

[The prepared statement follows:]

Statement of Eric J. Oxfeld, President, UWC-Strategic Services on Unemployment & Workers' Compensation

Good morning, Madam Chairman and members of the committee. My name is Eric Oxfeld, and I am President of UWC, the only business organization specializing exclusively in public policy advocacy on national unemployment insurance (UI) and workers' compensation issues. UWC members are employers of all sizes and industry, national and state business associations, and third party administrators and accounting firms, all of whom are concerned about maintaining a sound UI system.

UWC is intimately acquainted with UI laws and public policy. Our research arm, the National Foundation for Unemployment Compensation & Workers' Compensation, publishes numerous materials on UI, including the annual Highlights of State Unemployment Compensation Laws.

UWC supports the UI program, through which employers provide benefits for a temporary period of time to insured workers with a strong attachment to work who become temporarily and involuntarily jobless when their employer no longer has suitable work available. UWC believes that a sound UI program is best embodied through the state UI system, with a limited federal role where uniformity of state law is considered essential.

UWC, jointly with the FMLA Technical Corrections Coalition, leads the UI Working Group. The UI Working Group, which was established in cooperation with the Society for Human Resource Management, is a coalition of organizations, businesses, and associations committed to advancing sound UI policy. The UI Working Group opposes the Birth and Adoption Unemployment Compensation (BAA–UC) regulations proposed by the U.S. Department of Labor (DOL) because this proposal allows the misuse of state UI benefits trust funds to finance a new and disparate program providing paid parental leave. More information on the UI Working Group and its mission can be found on its homepage, www.SAVEUI.org.

The BAA–UC Proposal

The proposed BAA–UC regulation authorizes states to enact laws enabling workers to collect UI benefits while on leave following childbirth or adoption of a child up to three years of age. The proposal is described as an "experiment" designed to "test the proposition that providing [UI benefits] to the parents of newborns and newly adopted children who wish to take approved leave or otherwise leave their employment will increase their attachment to the workforce."

UWC and the UI Working Group believe that DOL's BAA–UC proposal is fundamentally and fatally flawed.

- DOL lacks the authority to promulgate the BAA–UC regulations, which are contrary to the clear and unambiguous intent of the Federal Unemployment Tax Act (FUTA) and the Family Medical Leave Act (FMLA).
- The proposed BAA–UC regulations are an attempt to "end run" Congress and amount to DOL legislating through the rulemaking process.
- The BAA–UC proposal will jeopardize the UI safety net for jobless workers by eliminating the federal protection against misuse of UI benefits trust funds for other purposes.

• The BAA–UC program violates the clear requirements of the Federal Unemployment Tax Act (FUTA) and will put employers in a state with such a program at risk of a 700% FUTA tax increase.
• BAA–UC and UI are different and incompatible programs.

DOL has exceeded its authority by proposing BAA–UC, which is contrary to the clear and unambiguous intent of the federal UI laws and the FMLA.

Allowing payments of UI benefits to workers on parental leave as proposed in the BAA–UC regulations is contrary to federal UI laws and the FMLA.

Indeed, former Representative Pat Schroeder, one of the original sponsors of FMLA, made it clear during congressional debate on the FMLA that workers taking family and medical leave would not be eligible for unemployment benefits: "The leave is unpaid, so your paycheck will stop. *There is not federal compensation such as unemployment.*" 139 Cong. Rec. E2010 (daily ed. Aug 5, 1993, emphasis added).

The Federal Unemployment Tax Act (FUTA) and related laws [1] effectively prohibit expenditures out of state unemployment benefits trust accounts for any purpose other than payment of "unemployment compensation." [2] As former Representative Schroeder clearly understood, BAA–UC payments constitute "paid parental leave" and are not "unemployment compensation."

The plain meaning of the term "unemployment" as used in the FUTA requires all unemployment compensation claimants to meet a 3-pronged test. Under this test, UI claimants must be:

(1) Without a job;
(2) Involuntarily unemployed; and
(3) Able and available for work.

These federal requirements are a cornerstone of UI policy, confirmed by consistent administrative interpretation, FUTA legislative history, and subsequent action by Congress. These 3 requirements were recognized in the legislative history of federal UI laws, and they are consistently identified and applied in administrative interpretations of those laws from 1935 until the current notice of proposed rulemaking.

Payments out of state UI benefits trust funds for workers who take parental leave are inconsistent with all 3 of these statutory requirements. A worker on parental leave cannot be considered to be "without a job" because the worker has a job, either by law or through arrangement with the employer. When a worker is on parental leave, the worker's absence from work is not "involuntary" because the absence (from start to finish) is by the worker's choice, not the employer's. Finally, when a worker is on parental leave, the worker is not "available for work" because the worker cannot return to work *until after the leave period expires,* which may be 3 months, 6 months, or even 1 year later.

Federal UI law includes the "able and available" requirement even though there is no specific reference to this requirement in the FUTA. Until now, DOL has consistently recognized and applied the able and available requirement. As recently as 1997 DOL clearly understood that use of UI trust funds to compensate workers on family and medical leave would violate federal UI law. In separate letters from the DOL regional office to the Vermont Department of Employment & Training, and from DOL Employment & Training Administration Assistant Secretary (Acting) Ray Uhalde to Senator Patrick Leahy, DOL stated that UI payments to workers on family leave are contrary to the federal requirement that UI beneficiaries be "able and available" to work.

To cite another example, in 1955 DOL described UI as "a program—established under Federal and State law—for income maintenance during periods of *involuntary* unemployment due to *lack of work*" (emphasis added). When a worker takes leave in accordance with the FMLA, the employer must hold the worker's job open. During the leave period, the worker is *not* "unemployed" or "available for work."

Commentator Ralph Altman, of DOL's then named Bureau of Employment Security, noted: "The availability requirement in unemployment compensation is uni-

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[1] E.g., Federal Unemployment Tax Act [26 U.S.C.A. 3301 et seq] 3304(a)(4). The penalty when a state is out of conformity with the FUTA is loss of the FUTA "offset credit" for all employers in the state—a more than 700% tax increase from $56/worker to $434/worker.

[2] Where Congress has decided that it is appropriate to deviate from this basic UI principle it has done so by a limited number of express exceptions. For example, under FUTA Section 3304(a)(4) employee contributions may be used for payment of temporary disability benefits. FUTA 3304(a)(4) also contains provisions expressly permitting payments out of state unemployment trust accounts for health insurance premium payments by UI recipients; repayment of UI over-payments; payment of UI benefits to workers in approved work-sharing (";short-time compensation") plans; self-employment assistance; and use of Reed Act funds for UI administrative costs. Parental leave is not covered by any of these exceptions.

versal as an inevitable result of a program which compensates wage loss" (Altman, *Availability for Work*, Harvard University Press 1950, at 2).

The able and available requirement has also been repeatedly recognized by Congress. For example, in the 1998 Green Book, the House Committee on Ways and Means stated: "All state laws provide that a claimant must be both able to work and available for work. A claimant must meet these conditions continually to receive benefits. 'Available for work is translated to mean being *ready, willing, and able* to work" (1998 Green Book at 336, emphasis added). The BAA–UC proposal makes the extraordinary assertion that "able and available" somehow can be interpreted to mean "unavailable now but perhaps available later." This interpretation of the federal "able and available" requirement contradicts the plain meaning of the word "available" by covering employed workers who take leave from employment *when the employer has work available* but the worker cannot, or does not wish to, work.

DOL recommends that a state pay BAA–UC benefits for 3 months. The proposal allows states to use different maximum durations. Under the BAA–UC proposal, states could provide BAA–UC benefits for 6 months (standard duration of UI benefits) or even 1 year. Thus, the BAA–UC proposal requires the conclusion that a worker who is away from, and unable to, work for a significant amount of time—up to an entire year—may be considered "available" during the entire leave period because at the end of this period he or she *may* decide to return to the prior job or job market.

It is impossible to understand how a worker who made a decision to take leave dedicated to the up bringing of a child can in any way be considered "able" or "available" for work during the leave period consistent with sound UI policy. If the worker were in fact, "able and available" there would be no leave taken.

Even if one accepts the illogical and invalid assertion that a worker can be considered "available" under the federal "able and available" test *during* parental leave because of the intention to return to work *following* this leave, we note that the proposal lacks any provision for demonstrating the parent's intention to return to the previous employer or other meaningful attachment to the workforce *prior to the conclusion of the leave period*. The only recognition of eventual work force attachment is that states would be allowed to recover BAA–UC payments if the worker fails to go back to work. It is completely ineffective to rely on repayment of BAA–UC benefits if the worker fails to return to work because the likelihood of ever fully collecting these funds is remote, and there is no requirement that states attempt to collect them.

The requirement that a claimant be "able and available" for work is critically important in determining attachment to the workforce. Meeting this requirement demonstrates a clear and ability and willingness to rejoin the workforce immediately. Indeed, DOL's Employment and Training Administration (ETA) web site states: "Unemployment insurance pays benefits to qualified workers who are *unemployed* and looking for work (emphasis added). In its 1998 UI Dialogue, DOL stated that the "basic Federal requirement for eligibility is that the worker be able to work and available to accept an offer of work." A Dialogue: Unemployment Insurance and Employment Security Programs, Dialogue Technical Supplement at 11 (1998).

It is noteworthy that during DOL's two year dialogue, which involved 65 meetings attended by nearly 4,000 individuals representing business, labor, and government, DOL did not report any recommendations to extend UI benefit payments to workers while they are on parental leave or are otherwise unavailable for work.[3]

Exceptions to the FUTA "availability" test cited in the BAA–UC proposal do not support misuse of UI trust funds to compensate workers who take parental leave

The proposed rule states: "Under its authority to interpret Federal unemployment compensation law, the DOL interprets the Federal 'able and available' requirements to include experimental Birth and Adoption Unemployment Compensation." The BAA–UC proposed rule then lists several examples of interpretations of the federal "able and available" requirement. Contrary to the conclusions drawn in the proposed rule, however, these examples do not support the contention that BAA–UC is consistent with the "able and available" test. The examples are materially and legally distinguishable from BAA–UC.

First and foremost, Congress has specifically recognized exceptions from the "able and available" requirements but has not chosen to include parental leave.

• Unlike the BAA–UC proposal, the exception under UI for **state approved training** is the product of congressional action expressly waiving the "able and available" test. In fact, a worker in approved training is engaged in an activity that

[3] See e.g., DOL's February 1999 summary of Unemployment Insurance and Employment Service Program: A Dialogue, and *UI Occasional Paper 99–5* at 170.

is directly designed to enhance the worker's employability, and a worker's failure to be available for the training is disqualifying.

• The **illness** and **layoff** examples in fact require denial of benefits to any claimant who demonstrates that he or she is not available by refusing an offer of suitable work. Note that Congress has expressly recognized that states can legally suspend the availability test for EB if a worker is hospitalized. Federal State Extended Benefit Act of 1970, section 202(a)(3)(A)(ii)(II).

• The final DOL example, **jury duty**, can also be reconciled with the able and available test and distinguished from parental leave. Unlike parental leave, when a worker is called for jury duty the government itself has *compelled* the worker's removal from employment, thus the separation is involuntary. Most states do not provide UI benefits to compensate workers while on jury duty because they recognize that such payments are inconsistent with the basic purposes of unemployment insurance. However, unlike parental leave, Congress has expressly recognized that states can legally pay UI benefit to a worker on jury duty. Federal-State Extended Benefit Unemployment Compensation Act of 1970, section 202(a)(3)(A)(ii)(I).

BAA–UC is an attempt to legislate through rulemaking

The BAA–UC proposal is a change in the fundamental purpose of unemployment insurance. Only Congress has the power to make this change in the basic mission of the UI program. Proposing BAA–UC through rulemaking amounts to legislating through the Department of Labor—at the expense of Congress, the states, and employers. In effect, the BAA–UC proposal is a regulatory "permission slip" for states to misuse UI by going through the "back door"—the *rulemaking* process—to achieve what *Congress* did not and would not agree to do. DOL delayed publishing the Notice of Proposed rulemaking until after Congress adjourned (and most members of Congress left town), with the public comment period closing before Congress returned. The timing of the proposed rule appears to be a conscious decision to avoid an adverse congressional response to the use of rulemaking to circumvent the federal "able and available" test and the clear intent that the FMLA does not require paid leave.

BAA–UC is a new and disparate benefit unrelated to legitimate UI

The proposed regulations and the model state law included with the proposed rule consistently demonstrate that BAA–UC is a disparate benefit for a disparate class of recipients which is functionally and legally different from legitimate "unemployment compensation." As noted above, federal law requires that a worker be involuntarily jobless and both "able and available" in order to collect UI benefits. This legal test cannot be met by a worker taking parental leave. Thus, the proposed rule proposes to create a new parental leave compensation benefit financed by the misapplication of UI trust funds. The proposed rule does not demonstrate any nexus between "regular" UI benefits and BAA–UC, yet it seeks to finance these benefits out of UI payroll taxes. BAA–UC is entirely different from legitimate UI. As state in DOL's Fact Sheet on Unemployment Insurance, published by the Employment and Training Administration: "unemployment compensation is designed to provide benefits to most workers out of work due to no fault of their own for periods between jobs." BAA–UC benefits are for employees who have jobs and take leave to be with a newborn or newly adopted child (see Section 604.2.) BAA–UC is compensation for voluntary parental leave from work, thus it cannot be unemployment compensation.

The differences between BAA–UC and UI benefits are strikingly clear. Unemployment compensation and parental leave compensation have different and incompatible purposes, and the UI system is not equipped to handle payment for parental leave. The UI program is intended to be a re-employment system. The purpose of UI is to compensate a worker who becomes temporarily unemployed when the employer no longer has suitable work available, while continuing to search for suitable work. Family leave, on the other hand, is in part to "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity" (*see* e.g., Section 2(b)(1) Family and Medical Leave Act, P. Law 103–3.).

The differences between parental leave and UI are starkly demonstrated by the number of standard UI elements that should or could be varied in attempting to fit the "square peg" of parental leave into the "round hole" of UI, including the following:

(1) Voluntary quit disqualification is eliminated
(2) Availability for work eligibility requirement is eliminated
(3) Ability to work eligibility requirement is eliminated
(4) Refusal of suitable work eligibility requirement is eliminated

(5) Work search test is waived
(6) BAA–UC benefit duration is recommended for 12 weeks and may be up to 1 year, unlike the 26 weeks of regular UI benefits
(7) No extended benefits are payable for BAA–UC (although BAA–UC claimants apparently would be counted as unemployed for triggering benefit extensions)
(8) BAA–UC benefits can be concurrent with legitimate UI benefits
(9) BAA–UC costs would be socialized under DOL's recommendations, not experienced rated
(10) Means testing may be appropriate for compensating parental leave but are not permissible under BAA–UC because benefits are delivered and financed through the UI system
(11) An exemption for small business may be appropriate for compensating parental leave but is not permissible under BAA–UC because benefits are delivered and financed through the UI system
(12) Worker contributions, rather than employer contributions, may be appropriate for BAA–UC but not UI

The fact that *all* of these basic characteristics of legitimate UI must be changed to accommodate BAA–UC compensation makes crystal clear that these are two entirely separate systems and that BAA–UC is outside the scope of the UI program.

Section 604.3(b) of the proposed regulations provides another clear example of the new and disparate class of beneficiaries which BAA–UC will create. "Approved leave" means temporary separation "after which the employee will return to work for that employer." The assumption that workers who take leave will return to employment is invalid. Many workers who take leave choose not to return to work.

Section 604.20 states that "All persons covered by a state's UI law must also be covered for Birth and Adoption unemployment compensation." This section demonstrates why UI and compensation for family leave are and should be separate. As DOL correctly points out, UI programs have near universal coverage and cannot be limited by type of industry or other factors unrelated to a claimant's unemployment. On the other hand, a state may determine, quite within the bounds of the law, that certain industries or employers should be exempt from family leave compensation requirements or that means testing is appropriate. The policies and mechanics underlying UI and BAA–UC are disparate and ought not be forced to fit together.

Workers who receive BAA–UC should not be counted as "unemployed" for purposes of extended UI benefits

The proposed rule is correct in providing that BAA–UC benefits cannot be the basis for extended benefits (EB) under the Federal-State Extended Unemployment Compensation Act (EUCA). EB is expressly provided to provide additional weeks of UI benefits for otherwise eligible workers who may need more time to find suitable work when jobs are scarce during periods of high and rising unemployment. However, should the BAA–UC program be allowed to take effect, BAA–UC payments will inflate the "insured unemployment rate" and the "total unemployment rate" which are used to "trigger" EB benefit periods. Workers who are on leave are not unemployed and should not be counted as unemployed for EB purposes. However, nothing in the proposed rule provides for such a protection. This is another example of why BAA–UC is an entirely different benefit from legitimate UI.

BAA–UC threatens the UI safety net

For more than 65 years, federal law has protected jobless workers, employers, and the public by assuring that state unemployment trust funds are used for the sole purpose of paying unemployment compensation. This protection is so deeply embedded in the federal-state UI "partnership" that federal law prohibits the use of state trust funds even for the related purpose of financing the *administrative* cost of processing claims for unemployment benefits. By allowing the expenditure of state *unemployment trust funds* for the entirely different and incompatible purpose of compensating employed workers who take *parental leave*, DOL's proposed rulemaking will change the fundamental purpose and nature of the UI program, the *safety net for jobless workers*. Elimination of this essential federal protection for the jobless will abandon the principle that serves as a cornerstone of the nation's unemployment insurance system.

Allowing the misuse of UI benefits trust funds to finance paid leave under the FMLA will eliminate the protection federal law has always provided against misuse of state UI reserves for purposes other than payment of *unemployment* compensation. This new use for UI benefits trust funds for paid leave will in due course deplete trust fund balances and lead to increased payroll taxes on employers and/or cutbacks in protections for workers who lose their jobs.

DOL Secretary Alexis Herman and other DOL officials have repeatedly—as recently as February 29, 2000, in hearings before this subcommittee—expressed concern that the existing UI program is now *under-funded*. For example, DOL recognized that states have not rebuilt their trust fund solvency to pre–1990–91 recession levels. See, *A Dialogue: Unemployment Insurance and Employment Security Programs*, Dialogue Technical Supplement at 24 (1998). In their fiscal year (FY) 1998 and 1999 budget requests, DOL called for legislation that encourages states to improve the solvency of their UI trust funds. At DOL's request, H.R. 3167 was introduced in Congress last year to give states incentives to raise or maintain high payroll taxes with the express purpose of enhancing state trust fund solvency.

In the 1980's and again in the 1990–91 recession, many states used up their UI reserves and had to borrow from the federal government. In the 1990–91 recession, more than half the states were forced to borrow. DOL's own statistics show that if another similar recession takes place, states will need to borrow an additional $2–4 billion. That figure increases to $20–25 billion if the recession is like the one in 1980–82. *Id.* The interest on federal loans to state UI trust funds cannot be paid from state trust funds and is an obligation of **state general revenues** at market interest rates—a painful and costly charge—taking money away from schools, roads, and other state priorities. As of 1997, states have paid more than $1.7 billion in interest on UI loans. *Id.* The State of Connecticut floated a bond to repay its most recent loan—and has yet to fully pay off that debt. Employers finance the bond fund through a special tax (sometimes referred to as a bond assessment) scheduled to end in 2001.

During the recessions discussed above, many states were forced to cut back on their UI benefits and eligibility to keep their UI accounts solvent.

Prior to and following the issuance of the BAA–UC proposed rule, and as recently as February 29 in hearings before this subcommittee, DOL has advocated that states expand access to UI by lowering monetary eligibility, adopting alternative base periods, and taking other steps that will increase UI benefit outlays for low-wage workers without any waiver of the joblessness, involuntariness, and availability requirements of federal law. UWC does not agree that these DOL expansion proposals are sound public policy, but we readily agree that—unlike the BAA–UC proposal—states have the legal authority to adopt them.[4] However, we must point out that by expanding UI to cover workers on parental leave and opening the door to other new uses of the UI program,[5] the BAA–UC proposal will put further pressure on state UI trust funds and work at cross purposes to DOL's solvency objective as well as its goal of expanded UI access for low-wage workers.

Ironically, the BAA–UC proposal sends a strong signal to the states not to build up their UI reserves—because any state that is risk-averse and wants to take a conservative approach in building up its benefits trust account risks irresistible political pressure to "spend it" now on an unrelated program.

Problems with UI should be fixed before considering changes in its fundamental purpose such as compensating workers who take parental leave.

The UI system is experiencing many severe problems, as outlined in UWC's testimony on UI reform at the hearings before this committee on February 29. Because of these problems, employers now pay $30 billion a year in UI taxes when there's practically no unemployment, and that figure could double or triple in the future, when the economy goes into recession. We believe these problems should be fixed, to protect workers and employers, before considering changes in the fundamental purposes of UI.

• *BAA–UC will exacerbate UI problems caused by inadequate administrative financing.* As detailed at length in our February 29 testimony, the federal government is not providing adequate financial resources for effective and efficient program administration by state UI agencies. DOL statistics show that the average UI claim now lasts 2 weeks longer than during previous periods when unemployment was low and there was a severe labor shortage. The extended claim duration is directly inflating state UI tax costs to finance additional, unnecessary weeks of benefits. A flood of new BAA–UC claims for workers on parental leave will further strain resources need to assist workers who have legitimate UI claims—and likewise further inflate the cost of legitimate UI benefits. This problem will grow in severity when the economic cycle turns.

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[4] We believe that the decision whether to lower monetary eligibility tests or by adopt alternative base periods, as advocated by DOL, should be a matter for the states and not mandated or "incentivized" by the federal government through financial rewards or penalties.

[5] At 64 Fed. Reg. 67974, the proposal unabashedly states that the information from BAA–UC could serve as "a basis for further expanding [UI] coverage."

• *BAA–UC will exacerbate problems with UI benefit fraud and abuse.* Improper payments under UI are already a serious problem, but the BAA–UC proposal contains provisions that will lead to increased fraud and abuse. The BAA–UC proposal does not condition receipt of benefit payments on any demonstrable effort to "bond" or actually spend any time with a child. How will UI agencies or employers possibly determine who is a "parent" (per the expansive definition in Section 604.3(f)) and whether he or she is bonding with a child consistent with the intent of the regulation?[6] The absence of any requirement to show contact and interaction with the child while collecting BAA–UC benefits will lead to large scale abuses. This defect will result in BAA–UC being little more than a paid vacation plan during hunting and fishing season, etc.

• *BAA–UC will undermine UI return to work incentives.* Under the proposal, payment of BAA–UC benefits can be concurrent with receipt of legitimate UI benefits if the worker on parental leave no longer has a job (e.g., because the FMLA leave has expired or the employer does not provide leave). This "double-dipping" improperly increases the amount of wage replacement to levels that will frustrate UI return to work incentives, thus further inflating legitimate UI costs.

• *BAA–UC will expand over-reliance on socialized costs.* Under DOL's model state BAA–UC law, BAA–UC benefits would be "socialized." Socialized costs are claim costs are financed through higher taxes on all employers rather than a charge to the employer at the time of separation of unemployment. Over-use of socialized costs for legitimate UI benefits is already a serious problem for state UI programs. It is inequitable to socialize costs because all employers are forced to subsidize benefits paid for claims by another employer's workers. Socialized costs also reduces the employer's interest in (1) maintaining a stable workforce, (2) making sure UI claims are paid properly, and (3) promptly re-employing laid off workers.

If states adopt DOL's model BAA–UC proposal, the problem of socialized costs will grow. Employers who already pay the maximum UI tax will not have to pay any additional taxes. Small businesses who are unable to hold jobs open for their own employees will subsidize paid leave by employees of their larger competitors.

BAA–UC raises a conformity question

The disparate nature of BAA–UC compared to legitimate UI is highlighted by the fact that it raises a UI conformity question. If a state passes a law or even promulgates an administrative provision based on a law allowing BAA–UC benefits to be paid to this new class of claimants, and DOL's proposed rule is then struck down in court as violative of FUTA conformity requirements, that state will be—de facto and de jure—out of conformity. The BAA–UC proposal puts employers in such a state at risk of the 700% FUTA tax increase which is the penalty for being out of conformity.[7]

BAA–UC is not UI, thus studies and the administrative costs of BAA–UC benefits cannot be financed from FUTA dollars

Of particular concern is the fact that even though states are not receiving enough administrative funding, they would be expected to use FUTA administrative funds to finance the administration of BAA–UC. By law Congress may appropriate FUTA funds only for "UI" administration and state employment services. Because BAA–UC is not UI, the direct cost of administering BAA–UC benefits may not be funded out of FUTA revenue. In the current context of UI administrative financing, it is extremely unwise for the federal government to add a new benefit to the UI system. The proposal cites no authority for using FUTA revenue to study and evaluate a parental leave compensation program.

Even if it were a valid use of FUTA to finance the administration of BAA–UC benefits, an additional appropriation would be required to cover the increased administrative costs. If the federal government to provide the additional appropriation, states will have to cut services. The administrative costs of state temporary disability insurance (TDI) programs, which are similar to BAA–UC, are not funded out of FUTA for the same reason.

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[6] This definition create situations ripe for abuse where "parents" with little if any actual contact or interaction with the child would be able to collect BAA–UC benefits contrary to the intent of the proposed rule.

[7] The state will also lose its FUTA grant which finances the state UI/ES administrative agency.

DOL's cost estimates and assumptions regarding fiscal impacts substantially understate the true cost of BAA–UC benefits

The proposal states that the BAA–UC rule could cost between zero and $68 million, depending on the number of states that implement BAA–UC (64 Fed. Reg. at 67975). This estimate is invalid because it understates the cost impact.

• An estimate of zero suggests no state will enact a BAA–UC law. The figure of zero cannot be accepted or valid because DOL cannot encourage states to adopt BAA–UC laws and then argue it will cost nothing because no state will take such action. In addition, how could the proposal be justified as a response to "expressed interest by a small number of states" if no state is expected to act? See 64 Fed. Reg. 67975. In fact if only one medium size state such as Massachusetts were to enact any conservative BAA–UC proposal, the cost impact will easily exceed $68 million.

• We believe it is fairer to take into account the possible impact if *all* states enact BAA–UC programs as DOL advocates. In that case, the direct additional state UI payroll tax burden on employers for compensating parental leave will be at least $18 billion per year, using conservative estimates. The calculation is straightforward. The current weekly UI benefit amount is approximately $200. If a claimant were to collect 12 weeks of benefits (as recommended in DOL's model state legislation) the direct price is $2,400 per claim. Because of the effect of experience rating, the ultimate additional tax will be $3,000 per claim. DOL has stated that there are 6 million potential claimants each year, thus the aggregate impact would be $18 billion. The annual effect of $18 billion is "economically significant."

• If it is permissible under federal law to pay compensation to workers on parental leave using I trust funds, then federal law also permits states to use UI trust funds to compensate workers who take leave for other reasons. We are aware of no basis in federal law for making distinctions among the various possible personal reasons for not being available for work. The "door" is either open or shut—it cannot be "ajar."

If states compensate all workers who take family or medical leave, using DOL's published estimates of the number of workers who would like to take leave, the additional payroll tax cost to employers for BAA–UC escalates to $84 billion a year.

• The proposed rule requires states to provide BAA–UC benefits to workers who quit their jobs because they do not have approved leave. Separation from employment ostensibly for parental or other types of leave will be considered compensable even though the worker has completely severed the employment relationship.

• The $18 billion (parental leave) and $84 billion (all FMLA leave) figures include only the higher payroll tax resulting from paying compensation to workers who take parental leave. The calculation doesn't take into account the cost of lost productivity or the fact states may decide to provide paid leave for 26 weeks like legitimate UI claims (or longer). Nor does it consider the impact on employers who will have even more vacant positions to fill or the impact on remaining workers who must work longer hours. Ironically, employers may have greater UI liability if replacement workers hired to substitute for workers on leave become unemployed and collect benefits.

• The proposed rule incorrectly states there will not be an impact to "small entities." Given that BAA–UC will have to be financed through higher taxes on employers, it stands to reason that there will be a direct impact to "small business[es]" and "small organization[s]." Apart from the statutory definition of "small entities" under the Regulatory Flexibility Act there is a practical concern that small employers will bear a disproportionate share of the cost of this proposal. The FMLA and some state leave laws exempt small employers. On the other hand, BAA–UC will have universal application because it is paid through the UI system. This means that small employers must incur the cost of compensating workers who take leave (in many cases, leave taken by employees of *other* employers) in the form of increased payroll taxes.

• The proposal makes an incorrect assumption that this proposal will not impact states in a material way. This assertion is wrong for several reasons. States themselves are large employers who must pay the cost of BAA–UC benefits their workers collect (an added cost to taxpayers, as well). Furthermore, BAA–UC is a new benefit, calculated on a different basis than regular UI, which will introduce a new and different class of beneficiaries into the UI system. State UI agencies will have to re-program their UI administration systems to handle this benefit, which will undoubtedly be a "material" dollar cost to states. These burdens will divert resources and attention away from serving workers who lose their jobs and workers and employers who use state employment services.

• All BAA–UC benefits will be "scored" for federal budget purposes as increased outlays. There will also be increased federal outlays for UI and BAA–UC adminis-

tration and decreased federal revenue because more workers will forego wages subject to federal income tax, FUTA, FICA and state unemployment tax.

BAA–UC conflicts with FUTA pregnancy provisions (section 3304(a)(12))

The BAA–UC proposal states that weeks preceding the week in which birth or placement takes place are not compensable. The FUTA at 3304(a)(12) already specifically addresses UI benefits during pregnancy. It states that "no person shall be denied compensation under ... State [UI] law solely on the basis of pregnancy or termination of pregnancy." [emphasis added] This provision of FUTA means that states cannot disqualify a pregnant worker who is able and available to work, and it clearly preserves the right and necessity to disqualify a pregnant worker who is unable to work and is unavailable for work because of pregnancy or any other reason. Nothing in the BAA–UC proposal provides any legal authority or rational explanation for qualifying a worker to receive BAA–UC benefits after giving birth when the same worker cannot receive UI benefits because she is unable to work and unavailable for work during the pregnancy itself. Either federal law prohibits payment of BAA–UC benefits to a worker who is not able and available to work—the only correct conclusion—or else it appears that federal law also permits payment of UI benefits to workers who in fact are unable and unavailable before the birth occurs—contrary to section 604.21 of the proposal.

BAA–UC is not truly an experimental program

DOL defines BAA–UC as an "experimental program," but nothing in the proposal distinguishes it from any other *permanent* program. There is no termination date, dollar threshold, data limitation or other factor that would suggest that this program is truly experimental. On its face, the proposal discusses the need for data to determine:

(1) whether individuals who are compensated for birth and adoption leave are more likely to return to employment,

(2) the effects on employers whose employees take compensated leave,

(3) the effects on all employers in a state who bear BAA–UC costs, and

(4) the effect on a state's unemployment fund.

There is precedent for developing a Notice of Proposed rulemaking (NPRM) for a study whereby interested parties could comment on the form and substance of the study. However, the proposal skips that step and attempts to collect data at the same time it expands UI benefits. Nothing in the proposal demonstrates an emergency situation in which skipping this step is justified.

Moreover the proposal provides that a comprehensive evaluation will be performed only when "at least four [s]tates have implemented legislation and operated a BAA–UC for a minimum of three years" (emphasis added). If only one state were to enact implementing legislation the impact could be significant yet no study would be conducted. The proposal states that, "the [f]ederal evaluation methodology has not yet been completed." We are greatly concerned that for a proposal of this magnitude with a "study" as its cornerstone, the proposed rule does not provide even a preliminary burden estimate. These points demonstrate that there is nothing "experimental" about this proposal.

Finally, DOL asserts that state participation is optional. In practice, however, we foresee significant political and economic pressure exerted states to enact BAA–UC programs.

The Model's recommendations regarding eligibility for and financing of BAA–UC are also troublesome. Employers are taxed to pay for legitimate UI benefits. We believe this is appropriate because employers are responsible for the circumstances connected with the unemployment, rather than the employee. BAA–UC is distinguishable from legitimate UI in that employers are *not* responsible for the circumstances connected with parental leave. To pay for parental leave benefits, states or employers should be able to impose an *employee* contribution. Consequently it is inappropriate to recommend financing of BAA–UC benefits out of employer contributions.

Paid parental leave is more like temporary disability insurance (TDI) than UI. Under TDI, state and private programs require worker contributions for a major part or the entire amount of the program, including administrative costs. While employee financing is appropriate for BAA–UC, the UI system is not equipped to handle collection of employee contributions. Only two states now have any employee contributions for UI. It would be a major change in UI administration to now collect employee contributions for parental leave compensation, and it would lead to greater use of employee taxes for legitimate UI. Finally, the Model lacks any effective protection against abuse. It would allow a state to recover an overpayment for BAA–

UC benefits paid to workers to do not return to work, but it is important to note that improperly paid benefits are rarely recovered once they are paid.

Conclusion

Although DOL describes BAA–UC as a form of "unemployment compensation," in fact BAA–UC will create a new and different type of benefit program compensating workers who take parental leave. BAA–UC is contrary to federal UI laws and the FMLA. To sum up, there are many reasons why the BAA–UC proposal is contrary to sound public policy and should be withdrawn:

1. "Unemployment compensation" is designed to provide benefits to workers out of work due to no fault of their own. BAA–UC benefits are for employees who have jobs and take leave to be with a newborn or newly adopted child. BAA–UC provides compensation for voluntary parental leave from work, thus it cannot be unemployment compensation.

2. Allowing states to use UI trust funds for parental leave compensation abandons the joblessness/involuntarily unemployed/able and available principles which serve as the cornerstone of the UI program, nation's social insurance system for *jobless* workers.

3. A worker who made a decision to take leave dedicated to the up bringing of a child *cannot* in any way be "able" or "available" for work consistent with sound UI policy statements. If the worker were "able and available" there would be no leave.

4. If all states adopt BAA–UC, there will be a direct additional state UI payroll tax burden on employers totalling at least $18 billion per year using conservative estimates—$84 billion if all FMLA leave is included.

5. DOL says the UI system is now underfunded. Expanding it for parental leave will put at risk the solvency of the safety net for workers who lose their jobs.

6. During DOL's two year dialogue which had 65 meetings attended by nearly 4,000 individuals representing business, labor, and government, DOL did not report any recommendations to change the fundamental nature of UI by using it to also compensate workers while they are on parental leave.

7. Congress has not amended the UI laws or the FMLA to permit use of UI trust funds for BAA–UC. This puts any state with a BAA–UC program at risk of being out of conformity with FUTA—and their employers at risk of a 700% FUTA tax increase.

8. The proposal lacks any provision for demonstrating the parent's intention to return to the previous employer or other meaningful attachment to the workforce *prior to the conclusion of the leave period*.

9. The proposal does not cite any legal authority why if BAA–UC payments are permissible under FUTA for leave to be with a newborn they would not be permissible for older children for other family or medical purposes.

10. DOL asserts that state participation is voluntary. To the contrary, significant political and economic pressure will be exerted on state UI administrators and legislators to enact BAA–UC programs.

11. BAA–UC will be rife with fraud and there is no effective manner to recover improper payments.

12. BAA–UC costs will not be distributed equitably among employers and should not be an employer obligation.

As detailed at the February 29, 2000, hearing on UI reform before this Subcommittee, the UI system is experiencing significant problems handling its existing obligations. Employers now pay nearly $30 billion a year in UI taxes when there is practically no unemployment. That figure will double or triple in future recessions. The current method of financing UI administration exacerbates these problems by providing inadequate funding for state UI and employment services agencies. Workers and employers are not receiving adequate service, and UI claims last longer than they should during this tight labor market. The UI system is not equipped to take on another new and entirely different purpose such as BAA–UC.

The cost of BAA–UC benefits plus higher UI costs resulting from prolonged claims for legitimate UI caused by diversion of administrative resources for BAA–UC claims, as well as the cost of lost productivity and new record keeping, will be borne by employers. Rather than adding new costs to the UI system, DOL should focus on reducing the inflated FUTA tax burden on employers and making adequate funds available for UI administration without putting greater strain on the adequacy of state UI benefit reserves needed for times of economic hardship.

By trying to force a new parental leave compensation benefit into the existing UI system, the BAA–UC proposal would in effect abolish the federal "able and available" requirement, which is a bedrock principle of UI. The BAA–UC proposal is contrary to the plain and unambiguous intent of UI law and policy and the FMLA. It

will put the UI safety net at risk and dramatically increase employer cost. Thus, we strongly urge that these unwise and unworkable regulations be withdrawn.

Chairperson JOHNSON. Thank you very much. Appreciate that. Ms. Hostetler.

STATEMENT OF KIMBERLEY K. HOSTETLER, DIRECTOR, HUMAN RESOURCES SERVICES, CONNECTICUT HOSPITAL ASSOCIATION, AND MEMBER, SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Ms. HOSTETLER. Madam Chairman. My name is Kim Hostetler. I'm Director of Human Resources Services for the Connecticut Hospital Association, and I also own a sole practitioner human resources consulting business in Bristol, Connecticut, where I'm an active member of the chamber.

I'm also a member of the Society for Human Resource Management, and I very much also appreciate the opportunity to speak today on behalf of those organizations and their members and a whole lot of other concerned citizens in Connecticut who are opposed to the Department of Labor's proposed rule.

This past July, I had the opportunity to speak at Senator Gregg's subcommittee hearing on issues with family leave regulations and as I said at that hearing, I am a firm supporter of FMLA and I think that probably it's one of the most significant pieces of employment legislation that Congress has passed.

I am one of those sandwich people that Representative Donovan referred to before. I'm a working mother with two daughters. I also have a husband who, in the past 14 months, has had two heart attacks. So I have some very personal and compelling reasons for understanding the value and appreciating the value of the Family and Medical Leave Act.

But I'd ask that if you take just one thing from my testimony today, what I hope that is the message that there are some very serious problems with the implementation the implementing regulations of the Department of Labor for FMLA, and they've caused serious problems with employers and they've also hurt employees.

My written testimony has a number of examples. So does my Senate testimony, real life stories, but the two primary issues are the very broad definition of serious health condition and the wide open, uncontrolled use of intermittent leave.

First serious health condition. Congressional intent on serious health condition was very clear. Minor ailments are not serious health conditions and the Department of Labor issued regulations that actually state that, but they have since flip-flopped on that issue, saying basically sorry for the confusion, but now if you've got a minor ailment, as minor as a cold if it lasts more than three days and you see a doctor, you get a prescription, it's a serious health condition and it qualifies for a family medical leave protection.

It is wide open now. Connecticut employers and employers across the country are running into examples of situations where employees are facing disciplinary action, generally for chronic attendance abuse, and promptly bring in a doctor's note for some often vague

condition, or they see spikes in FMLA usage during peak vacation times, for instance.

So like I said, it's wide open at the moment and it invites abuse as a result.

With regard to the uncontrolled use of intermittent leave, the Department of Labor's regulations require employers to track and to provide leave in increments as small as their payroll system can track. So rather than in periods of half days, which might be a reasonable approach, these increments are literally minutes, if that's what your payroll system works on.

So here, again, the opportunity for abuse is rampant. There's literally no system for checks or controls. Once an employee brings in an open-ended certification from a medical provider that says that time off should be taken as required, they can come and go as they please. Literally, they could take a day off a week forever and not exhaust their time.

So once again, there is no incentive to minimize absences and there is certainly no incentive to avoid abuse.

Another great example is perfect attendance awards. The time that employees take away from work under FMLA can't be counted for purposes of determining perfect attendance. This is impossible for employees to understand.

The fact that employees with perfect attendance are recognized side-by-side with an employee that nobody has seen for three months is confusing and frustrating, at best.

So there are real world problems and the problems make employers understandably nervous about offering paid time or certainly about expanding paid time, because they've seen what's happened in the last few years.

And what we're asking really is that the best course of action at this point would be to address those issues, remove those obstacles, remove those disincentives and fix the FMLA to make it as effective as it was designed to be.

If I could take just a minute, and I've just got a minute, to talk about the Department of Labor's proposed rule and the use of unemployment insurance. I'd like to say that it's not just the business community that doesn't think this is a good idea.

I work closely as a board member with two social service agencies in the Bristol community, both of whom work closely with populations that are frequently unemployed. Both are opposed to this concept and both for the same reason. It's a bad idea to raid funds from a safety net program for a group of needy employees or people and use it for a brand new benefit for another group of people.

Don't jeopardize a safety net for the out of work population is the message. And, of course, people that are unemployed don't support the proposal, as well. They don't support using unemployment funds this way. They're very worried about the potential of unemployment fund shortages or cutbacks in benefits, especially if the economy turns bad.

So I think that the idea that just because we're flush with funds right now and this is an opportunity for using UI funds is wrong and it's irresponsible.

Local Bristol chamber employers are also opposed. There are examples in my testimony. Our hospitals and our health care pro-

viders, as you personally well know, are facing severe fiscal crises at the moment and they are very worried. They have experienced layoffs, they're continuing to experience layoffs, and what they are concerned about is that unemployment resources be available to displaced workers.

And the bottom line of all of this is we think there is a better way. You've talked about an example earlier in your statements about the use of tax credits. It's a wonderful idea. I think first and foremost, we should address the issues with the FMLA, remove the disincentives from using a program and a law that's already available. There's current legislation, in fact, that was proposed on that would be wonderful if we could see that pass quickly on a bipartisan basis.

And supporting the win-win proposition that you mentioned before of compensatory time just seems like such a wonderful idea to increase employee flexibility, to increase employee choice. What an opportunity. Why haven't we moved forward with that on a bipartisan basis? Exploring the use of employee pre-tax accounts, the concept of using a program like a 401(k) savings account or a dependent care flexible spending account would be another alternative.

Encouraging flexible work arrangements, things like job sharing, things like flex time, things like telecommuting, those are all other options and other good options that are being explored and could be encouraged.

I think this concept of bonding is such an important concept, but bonding doesn't just happen in the first 12 weeks. It's a lifetime commitment and we need to look at long-term solutions, fixing the laws that we already have in place that are supportive and providing policies and an environment that encourages employers to expand policies that are already available.

So I applaud your holding this hearing and I very much appreciate having the opportunity to speak. Thank you.

[The prepared statement follows:]

Statement of Kimberly K. Hostetler, Director, Human Resources Services, Connecticut Hospital Association, and Member, Society for Human Resource Management

INTRODUCTION

Congressman Johnson and Members of the Subcommittee:

Good morning. My name is Kim Hostetler. I am Director, Human Resources Services, for the Connecticut Hospital Association (CHA), and in that capacity provide services and information to our member hospitals and other healthcare organizations on topics and issues relating to human resources. Founded in 1919, the Connecticut Hospital Association has been representing hospitals and health-related member organizations for over 80 years. CHA's diverse membership includes the 31 Connecticut acute-care hospitals and their related healthcare organizations, short-term specialty hospitals, long-term care facilities, nursing homes, hospices, home health agencies, ambulatory care centers, clinics, physician group practices and many other organizations. CHA provides legislative and regulatory advocacy on behalf of our members by supporting initiatives that are in the interests of our members and their patients. I also own a sole practitioner human resources consulting business, Human Resources Management Services, in Bristol CT, where I am an active member of the Greater Bristol Chamber of Commerce. The Greater Bristol Chamber has over 1,200 individual and business members from the city of Bristol and surrounding towns of Plymouth and Wolcott whose common goal is to advance the commercial, financial, industrial and civic interests of the community.

In my capacity as a Human Resources professional, I am an active member of several professional organizations, including the Society for Human Resource Management (SHRM) and its local chapter, the Human Resources Association of Central Connecticut (HRACC). SHRM is the leading voice of the human resource profession, providing education and information services, conferences and seminars, government and media representation, online services and publications to more than 130,000 professional and student members throughout the world. I very much appreciate having the opportunity to voice the objections that these organizations and their members have to the Department of Labor's Proposed Rule on Birth and Adoption Unemployment Compensation.

This past July, I had the privilege of representing CHA and the Greater Bristol Chamber at one of the four Congressional hearings that have been held to examine the impact and unintended problems with the Family and Medical Leave Act's implementing regulations and interpretations. Both these organizations, and their respective members, are firm supporters of the FMLA as it was conceived and passed. However the implementation of the law—through the Department of Labor's complex regulations and contradictory opinion letters—has moved it far from its original intent, resulting in substantial unintended consequences for employers and employees alike. As a result, I testified in July that we would like to see relatively modest, but very important revisions made to current FMLA provisions, especially before any further expansion is discussed.

Now that the Department of Labor's Proposed Rule on Birth and Adoption Unemployment Compensation (BAA–UC) has been published, our concern has deepened. Four separate congressional hearings have documented the substantial issues that exist with the Department of Labor's current FMLA regulations and interpretations. We feel strongly that no expansion of any sort, including this proposal to provide paid family leave, should be considered before these regulatory and administrative issues are addressed. We also feel strongly that tapping into the safety net for jobless workers to provide pay for an entirely different program—employees on family leave—will endanger the solvency of unemployment insurance trust funds, represents an inappropriate attempt to circumvent legislative authority, and violates both the original spirit of the Family and Medical Leave Act as well as current Unemployment Insurance law.

Issues With Current FMLA Regulations

In my work with CHA, with the Bristol Chamber, and with the Human Resources Association of Central Connecticut, I have found remarkable uniformity in reactions to FMLA administration. People repeatedly confirm that while they and their organizations have a deep and abiding commitment to meeting the concepts, the purpose and the provisions of the Act, they face substantial, burdensome administrative requirements as a result of the Act's regulations. While the intent of the FMLA seems simple and clear and is fully embraced by these professionals and their employers, the administration of the Act is far from simple and clear and has resulted in confusion, employer and coworker frustration, enormous time investment and lack of control over attendance policies.

[Note: The differences in eligibility parameters and leave amounts between the FMLA and our state Family and Medical Leave Act, passed in 1990, make administering FMLA programs particularly complex in Connecticut. However, given the state's tendency to follow federal guidelines in many key areas, we welcome positive and constructive modifications at the federal level.]

The purpose of the Family and Medical Leave Act, as defined by Congress in the text of the Act, is to balance the demands of the workplace with the needs of families in a manner that accommodates the legitimate business interests of employers [emphasis added]. The Department of Labor's implementing regulations and opinion letters have moved far from that instruction. There seems to be little accommodation for the truly legitimate business interests of employers, and there have clearly been unintended negative consequences for employers and employees alike.

When the FMLA passed Congress, it seemed straightforward and simple: employees are provided protected, secure time off from work to deal with serious medical or family issues. But, as I noted in my Senate Subcommittee testimony, the devil is in the details—or, more specifically, the devil is in the Labor Department's regulations! The primary issues in our experience, for organizations trying to administer leaves under the FMLA correctly, are:

- the very broad definition of "serious health condition"
- the uncontrolled use of intermittent leave
- the 2-day notice requirement, and
- the interference of FMLA with attendance control policies in questionable cases.

In addition, the inability of employers to count FMLA designated time for purposes of determining perfect attendance award eligibility is counterintuitive and perceived by employers and employees alike as unfair.

Definition of "Serious Health Condition"

The FMLA was intended to cover "serious health conditions" which implied that hospitalization, extended lengths of treatment or serious chronic conditions would be covered by the law, and that employees would be allowed time away from work to attend to their family's needs, a laudable goal. However, our experience demonstrates that some employees seek to use this time for conditions well beyond what a reasonable person would define as a serious health problem. Extremely broad Department of Labor regulations and guidance on the definition result in employers being required to certify all kinds of mild or minor conditions as FMLA-protected, including such things as bad colds, simple outpatient procedures not contemplated by the Congress which do not require extensive recovery times, and vague diagnoses of "depression," "stress," or "back pain." Despite an original opinion letter from the Department of Labor indicating that the cold, flu and non-migraine headaches were not serious health conditions, the Department issued a contradictory opinion letter the following year saying they could be. (These opinion letters are attached to my statement.) The conclusion of many employers is that the loose definition currently in use makes the Act a target for abuse. Many Connecticut employers have experienced the situation where an employee facing disciplinary action promptly brings in a doctor's form verifying an often-vague condition requiring immediate time off. This is extremely frustrating to employers, but it is equally disturbing to coworkers who are left with the work. One of the biggest frustrations I hear from supervisors is their inability to effectively address employee concerns about a coworker whose manipulation of well-intentioned leave provisions leaves them with extra work and additional stress.

Intermittent Leave

The FMLA legislation envisioned allowing employees to attend periodic, intermittent appointments for medical problems, physical therapy, or family member medical appointments, or take necessary time off intermittently for serious chronic conditions, and have this time protected as FMLA leave time. Unfortunately, instead of keeping records of this leave in one-half day increments—a reasonable approach—the Department of Labor has required employers to allow leave time (and account for it) in the shortest increments of time tracked by their payroll systems, which can be as little as single minutes. This has created a world of administrative problems which can be rectified by simply changing the law to specify that FMLA leave time can be taken in increments of as little as one-half days.

Here again, the opportunity for abuse is rampant. Many organizations can point to chronic attendance abusers being able to virtually always produce a doctor's statement to cover periodic absences. The lesson here is that there seems to always be a small group of employees who will attempt (and generally succeed) in taking advantage of the loose and vague provisions of FMLA as it is currently defined. While there will always be people who look for all the angles, misuse benefits and abuse privileges, we need not make it as inviting for them as we have.

Two Day Notice Requirement

The law provides employers two days to designate employee absences as FMLA time off once the employer knows the leave is needed for an FMLA required reason. However, in many organizations, determining if absence is FMLA time most frequently occurs when time records are submitted for payroll processing—generally once a week or once every other week; the result is that the employer representative responsible for providing FMLA notice doesn't learn of the situation until well after the two day notice period has expired, and the employer cannot correct these entries retroactively.

Perfect Attendance Awards

The time an employee takes away from work under the Family and Medical Leave Act may not be counted for the purpose of perfect attendance awards. An employee who has taken three months off under FMLA—or missed 38 days intermittently due to a chronic condition—may still be eligible for a perfect attendance award. Coworkers find this impossible to understand. Morale is affected when those rewarded for perfect attendance are recognized together with colleagues who no one has seen in months. The law states "the taking of leave shall not result in the loss of any employment benefit accrued prior to the date of the leave." Employment benefits are defined as "all benefits provided or made available to an employee by an employer,"

and the Department of Labor has interpreted that to mean attendance awards. But the benefits contemplated in the law are "group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions"—clearly Congress was concerned about the loss or reduction of significant health and welfare benefits. To include perfect attendance programs—when attendance is the essence of the program—seems to go beyond congressional intent. Not only is such an interpretation unfair to employees who do have perfect attendance, but it is also unfair to employees who may need to miss time for equally compelling reasons that may not qualify for FMLA (such as having to take time for the funeral of a family member). We are not suggesting that absences covered by FMLA be counted for attendance control purposes or for performance evaluation, but only in the single instance of attendance award programs where it would make so much sense to employees and employers alike.

EMPLOYER COMMENTS ON FMLA ADMINISTRATION

While additional examples and first-hand stories of FMLA administration issues were included and are available in my Senate testimony, I also asked for current feedback from a group of human resources executives who attended a CHA meeting with me last week to prepare for today's testimony. They reiterated their concerns and universally expressed opposition to the Department of Labor's Proposed Rule on Birth and Adoption Unemployment Compensation. Following that meeting, one participant sent me the following email message:

This past year was our first year of tracking FMLA leaves in a credible way. Prior to that it was happenstance. As a firm supporter of FMLA, I was astounded by the year end report. In 1999, as an organization of 2000 employees with about 1800 who would meet the hour requirements, we had 194 employees participate in FMLA. 56% were on medical leave, 25% maternity, 14% intermittent, and 5% family. That represents 1,234 weeks taken for FMLA and, is equivalent to 24 FTE's. At one point in the midst of high census where we were reaching to grab anyone who could come in, we had 54 employees out on FMLA. Staffing was a nightmare for our nurse managers. We had one specialty area which has 7 FTE's and it had 3 out on FMLA. So, while I remain an ardent supporter of FMLA, I also think it needs to be reviewed in a significant way prior to expansion.

The most prevalent comment and story "themes" that colleagues have shared include the following:

- The regulations, which go beyond Congressional intention, are complicated and difficult to understand, frequently resulting in costly consultation with an attorney to determine eligibility, etc.
- Intermittent leave is the hardest thing for managers (and coworkers!) to deal with.
- The two-day notice requirement for FMLA designation is very difficult for employers to meet.
- The opportunities for—and examples of—abuse are rampant.
- FMLA makes absence control virtually impossible; it has become essentially impossible to address many chronic attendance abuse situations. This is extremely upsetting to other employees.
- There is frequently a correlation between employees facing disciplinary action and the use of FMLA. FMLA documentation is often presented at the point when disciplinary action has been initiated with an employee.
- Employers have found a pattern of attendance abusers taking intermittent FMLA leave on Mondays and Fridays.
- Employers report seeing employees using FMLA as a way of getting time off to which they would not otherwise be entitled (time off at peak vacation times, for example).
- Employees have become increasingly savvy about the opportunities for abuse available under FMLA (for example, coming in late and making up the time at the end of the shift when shift differential is provided).
- The common difficult diagnoses include headaches, back pain, asthma, depression, anxiety, bronchitis, stress, and stomach problems.
- Employers—and coworkers—are hurt by employees with controllable conditions—like ulcers, for example—when the employees chose not to follow the treatment regimen and experience periods of incapacity as a result.
- Some employers have reduced benefits as a result of FMLA (previously open-ended or 6-months leaves are now limited to 12 or 16 weeks, for example). Some employers have eliminated perfect attendance awards.
- Many employers are finding that the highest usage of FMLA time used to be for maternity leaves, but it is now serious medical conditions.

• Planned and scheduled leaves, even intermittent or reduced hours leaves, can be accommodated; it's the surprises for vague or questionable reasons that are so problematic for employers and coworkers alike.
• The amount of time employers spend on FMLA administration is growing, and in many cases is consuming large percentages of staff time.

These experiences and difficulties with FMLA administration are not unique to Connecticut organizations; similar experiences have been shared and documented in previous hearings.

ISSUES WITH THE LABOR DEPARTMENT'S PROPOSED RULE ON BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION

Our concerns with the Department of Labor's proposed rule are two-fold:
• We are opposed to tapping into the resources of a critical safety net program to provide funding for family leave, leaving the Unemployment Compensation system vulnerable to insolvency due to its application to situations for which it was never intended.
• We are opposed to the process—the issuing of Department of Labor regulations rather than an open, thorough legislative review.

It is not just the business community that has grave concerns about this proposed bill. I have been an active member of the Board of Directors of Family Services of Central Connecticut (FSCC) for many years, serving as Board Chair for the past four years. Family Services is a 104-year old agency providing social and behavioral health services throughout thirteen (13) communities in central Connecticut by providing services and advocacy on behalf of families and their members. One of our most significant projects during the past two years has been the Employment Success Program, a welfare-to-work initiative operated collaboratively throughout the state under the auspices of the Connecticut Council of Family Service Agencies. Its purpose is to assist people who are leaving the welfare rolls to achieve economic independence by identifying barriers to employment, developing family plans and budgets, and providing referrals to specific services. This successful "safety net" program is now in its third year. This is third year that I have also served on the board of the Bristol Preschool Child Care Center (BPCCC), an organization that has provided quality, age-appropriate child care services to economically disadvantaged families in Bristol for almost thirty years. Currently the program serves one hundred twenty-three (123) three to five year olds. Both of these organizations provide services to a population that often faces unemployment. Both of these agencies oppose using unemployment insurance trust funds to pay for paid family leave. Their reasons are similar: let's not drain resources from one needy population to provide a new support service for another population. Both favor the concept of financial support for those who need it to take family leave, but not at the expense of jeopardizing the safety net for the out-of-work population.

My work with those two organizations has intersected in one other way. The Connecticut Council of Family Service Agencies (CCFSA) recently published *Families Work: The 2000 Report on the State of the Family in Connecticut*. CCSFA has worked with the Connecticut population transitioning off welfare through its Employment Success Program (ESP). In the report they have identified trends during 1998–99, all of which complicate attaining employment success. Almost half (44%) of the referrals into ESP's Safety Net program were families who were unable to comply with program rules: they were most commonly sanctioned for loss of jobs, often through lack of daycare. And hospital HR leaders have commented that one of the most common reasons employees ask to extend their planned leave period is not a desire to stay home rather than work, but a lack of adequate child care. Perhaps the goal of providing support for working families would be better served by first focusing on closing the harmful gap between the availability and the need for quality childcare.

People who are unemployed are also concerned about and opposed to the Department of Labor's proposal. The Human Resources Association of Central Connecticut sponsors a "HR Lead Group"—a networking and information-sharing group for HR professionals who have lost their jobs. During a meeting of this group on March 1st, the Department of Labor's proposed rule was discussed. The meeting was attended by 15 HR management level individuals, all in transition and seeking employment, and all seasoned professionals. The group was generally well informed on this issue, and all reacted very negatively to President Clinton's proposal. No one present supported using unemployment funds this way. Participants were particularly concerned about potential unemployment funds shortages or benefit cutbacks, especially if we head into a period of economic downturn. They also expressed con-

cerns about increased record-keeping and cost burdens for employers, and the potential for paid leave to discourage attachment to the labor force.

In Connecticut, our unemployment insurance system was so overburdened in the early 1990's that we had to float a bond worth nearly a billion dollars to cover the deficit. Connecticut employers have been paying an annual special employer assessment every year since then, which is just now expected to end in August 2000. So Connecticut employers and unemployed individuals are understandably nervous about any changes that would jeopardize the solvency of the trust fund. Even the Connecticut Department of Labor is not supportive of the federal proposal. During a presentation to Bristol Chamber members in January, a department director said that the general sense of the Department is that after just coming off the problems with our program, this isn't the right direction. . . He said that most state administrators have not warmed to the idea and that whether paid leave is a good idea or not, state unemployment funds weren't set up to deal with this.

Local employers who belong to the Bristol Chamber have also voiced strong opposition:

• We're a small business. As part of our benefit package, we provide short-term disability income insurance for our employees, which pays up to 13 weeks. Our employees have taken advantage of this benefit on four separate occasions—four new babies in our "family." If employees are allowed to collect unemployment benefits for maternity leave, should I then consider eliminating short-term disability income from our benefit package? The working environment in most small businesses is family-oriented. Flextime, part-time, work-at-home options are being implemented in small businesses more and more, particularly during this tight labor market. Small businesses want to accommodate dependable, loyal employees. Allowing employees to collect unemployment during family leave will erode the family-like relationship that exists in many small businesses. This is not just about an increase in the FUTA tax rate. It's as much about government forcing small employers to do things that they might well be doing on their own—because they want to!

• I own a small job shop. We fluctuate between 24 −30 employees and are looking for good people now. Only once in our history have we had to have a lay off due to slow down in work and at that time I was proud to know we had unemployment benefits to offer our laid off workers as they looked for other employment. The burden of that benefit in this state has become an enormous weight especially on small business trying to control the cost but must pay for the interest assessment on the bond. Times are good now with unemployment low but history has proved that will change. If employees are allowed to collect unemployment benefits for FMLA and my small shop must pay for that with increased taxes and must also pay someone to replace the employee who is not here how will we survive? Insurance companies offer insurance to employees for long and short term disability and my employees gladly of their own free will offer to pay the premiums in full to make sure they are covered if they must be out of work. If we must pay to replace an employee with skilled labor to get the work out the door to please our customers and we must pay the increased unemployment insurance and then conceivably pay an assessment because we didn't pay enough and must borrow again, what incentive is there to employ people? We as owners take all the risk, borrow all the money to run a company, invest in new machinery, spend money on training, etc. just to be taxed out of business. Many of us have put up our homes, our savings, all that we consider investing in our future and our children's future and the future of our employees and their families. Family Leave is a wonderful idea. . .I would love to see us all be able to take more time off to spend with our families. . .and not just when they are sick. But until we find a way to do that that doesn't put the burden on employers. . . or until we have a society that is not concerned with OUTPUT and production to make our economy grow, employers cannot be stuck with this mandate.

• I have read that the Department of Labor's Proposed Rule to alter the existing Family and Medical Leave Act (FMLA) is under consideration. This change to allow funds from the existing unemployment funds to be allocated to the FMLA would be devastating to businesses throughout the United States. If enacted, it would increase our cost of doing business, a cost that cannot and should not be passed on to our customers. As Plant Manager of four facilities in four different states, I believe the current FMLA has served as a useful tool for employees to address personal or family situations. The current practice promotes the proper usage to the intention of the law. We have finally started to manage our current unemployment insurance system and have eliminated much of the abuse. By allowing unemployment funds to those who qualify for the FMLA, we would be opening the doors to potential abuse. In addition to the abuse, the cost of hiring back-up personnel to

fill in would jeopardize our ability to effectively manage the business. THIS WOULD BE DISASTROUS TO THE BUSINESS CLIMATE!

• Using unemployment funds to subsidize FMLA is wrong. Furthermore the unemployment system is just now starting to regain its health. The FMLA gives employees a vehicle to use when they need to deal with specific family related issues. Let's not turn it into a vehicle that can be used to avoid work. The only way our economy grows and takes care of the people of Connecticut is when money is paid for a service. We do quite poorly when we pay money for nothing.

Our hospitals and other healthcare providers, especially home health agencies, are facing severe funding shortages, as Chairman Johnson well knows. In many cases these financial shortfalls have resulted in staff downsizing. Healthcare HR leaders and administrators are very concerned that unemployment compensation resources be available to displaced workers. If unemployment compensation funds are tapped to provide paid leave to employees who take family leave, there is no doubt that the increased costs will be substantial. This will be one more significant financial burden placed on employers who, in the case of the healthcare industry, are already struggling to maintain jobs, minimize layoffs, and in some cases, simply keep their doors open.

Our recent remarkable economic prosperity may be providing for some a false sense of security that our communities and employers can afford to allow current unemployment insurance funds to be used to pay for an entirely new entitlement benefit. But we cannot afford to lose focus on what this important program was established to provide. The decision to create a new entitlement benefit, as well as the decision on how to fund it, belongs with Congress.

SUMMARY

We feel strongly that no expansion of FMLA, including the provision of paid family leave, should be considered before these regulatory and administrative issues are addressed. The first step in increasing the provision of paid leave in this country should be to address the Labor Department's FMLA regulations and interpretations which are discouraging employers from implementing or expanding paid leave. Correcting the FMLA's administrative problems can result in employment policies which are more fair to all employees and which still achieve the intent of the original FMLA legislation. And exploring alternative or incentive approaches to increase paid family leave would achieve the Administration's objective, but without causing crisis to our unemployment system in the process.

We would like to request your consideration of the following points and suggestions.

A. To address the FMLA's unintended consequences, we urge Congress to consider the following suggestions on a bipartisan basis:

1. *Restore the FMLA to original Congressional intent by clarifying and tightening the definition of "serious health condition".* Perhaps for all conditions other than chronic health conditions, the current definition of serious health condition which includes a minimal period of incapacity (time away from work) of "more than three consecutive calendar days," could be changed to 14 days, or minimally, seven days. This would still protect any serious conditions, but would eliminate the need to designate and track questionable situations that may be addressed by a company's sick leave like minor injuries, earaches, headaches or flu.

2. Given the difficulty in meeting the two-day notice requirement, *change the law to allow employers three weeks, rather than two days, to retroactively designate absences as FMLA leave time and provide written notice.* This change alone would simplify the administration of this program immensely.

3. *Require that intermittent leave be offered and tracked in increments of not less than one-half day* as Congress originally intended.

4. Because of the inherent unfairness of exempting FMLA time from attendance program consideration, *clarify that employers may record FMLA leaves as absences for purposes of perfect attendance awards only* (the only "employee benefit" that could be so affected by FMLA use).

5. *Address the intermittent leave certification process.* The employee taking intermittent leave now has no responsibility in the process (e.g., to request FMLA)—the onus is completely on the employer to deal with the absence. There is virtually no system of checks or controls. Once an employee has an open-ended certification from a medical provider indicating that time off should be taken as required, the employee can come an go without providing notice and there is no incentive to minimize absences and avoid abuse.

6. *Clarify the eligibility parameters to say 12 continuous months of employment.* Given the unusual and varied staffing arrangements used by healthcare providers (and now employers in other industries as well), including sporadic on-call work and summer/after-school jobs, it is difficult to determine whether an employee with a history of these kinds of short-term assignments has met the eligibility requirement.

7. *Remove the FMLA restriction that prohibits the use of certain providers for second opinions.* In any case where employer has reason to doubt the validity of the medical certification, the employer may require a second opinion. But the health care provider used for that second opinion cannot be employed on a regular basis by the employer. That provision is in conflict with ADA, disability, and workers' compensation provisions. Use of regular company doctors for second opinions would be easier, quicker, more practical and reasonable.

B. To address the need for some employees for paid family leave:

1. First and foremost, *address current problems with the FMLA's regulations and interpretations that are actually serving as a disincentive for companies to offer or expand paid leave policies.* We urge the speedy enactment of technical corrections, S. 1530—The Family and Medical Leave Clarification Act, on a bipartisan basis to remove current disincentives that actually discourage employers from providing paid leave.

2. *Support the win-win proposition of compensatory time.* Proposals such as H.R. 1, the Working Families Flexibility Act of 1997, or S. 4, the Family Friendly Workplace Act, would allow employers to offer and employees to receive overtime payment in the form of time-and-one-half paid compensatory time off in lieu of cash payment, enabling employees to bank paid time off for times when it is needed.

3. *Explore the use of employee pretax savings accounts* (such as an IRA or dependent care flexible spending account) for funding leaves.

4. Encourage flexible work arrangements such as job sharing, flextime, and telecommuting, perhaps with tax incentives and certainly by removing current obstacles or disincentives.

5. *For employers that do not provide paid family leave already, encourage the inclusion of such a benefit as an option in cafeteria-style benefit plans.*

6. *Promote utilization of existing tax credits for adoption assistance which are available for employers to help adoptive parents.*

7. *Thoroughly explore all alternative funding options.*

Tapping into the security program for jobless workers to provide pay for employees on family leave will endanger the solvency of unemployment insurance trust funds and represents an inappropriate attempt to circumvent Congressional legislative intent and authority.

Thank you again for the opportunity to participate in this morning's hearing.

[The attachments are being retained in the Committee files.]

Chairperson JOHNSON. Thank you. I appreciate your comments. Mr. Emsellem.

STATEMENT OF MAURICE EMSELLEM, DIRECTOR OF PUBLIC POLICY, NATIONAL EMPLOYMENT LAW PROJECT, NEW YORK, NEW YORK

Mr. EMSELLEM. Good afternoon, Madam Chair, Congressman Cardin. My name is Maurice Emsellem. I'm Public Policy Director with the National Employment Law Project. Thank you for this opportunity to testify in support of the Administration's proposed regulations and the initiatives in the states to provide unemployment benefits to workers caring for newborn or newly adopted children.

In the time I have, I'd like to make a few key points that are covered in detail in our written testimony.

First, it's important to stress that the program announced by the Department of Labor serves the purposes of the unemployment comp system by maintaining and increasing attachment to the

labor market for all workers, but especially low income working families.

Years of research on family leave policy clearly shows that paid family leave is strongly associated with increased labor force attachment. The studies show that those workers with access to paid family leave work later into pregnancies and they return to work much sooner.

Second, the initiative has provided an unprecedented opportunity to educate the public about the unemployment comp program, which has happened a lot in today's hearing already.

The fact is that the states already cover workers who are temporarily separated from work for family reasons and many other circumstances that are not strictly limited to coverage of the, quote-unquote, involuntarily unemployed, as we discuss in detail in our testimony.

Therefore, whatever one's view of the merits of the program, it is not true, in our view, that the states that have proposed such legislation are acting outside their rights to expand benefits beyond a narrowly defined group of the involuntarily unemployed.

Finally, I'd like to spend the last couple minutes I have to talk about the UC funding situation. Since, as we have heard today, one of the main arguments often made against the proposal is that the trust funds can't handle this benefit expansion.

Let's take a look at what's been going on with the UC funding situation since the last recession ended in 1992. First, because of the sustained low unemployment rate, trust funds have been building fast. In fact, since 1992, trust fund reserves have literally doubled from 26 billion dollars to over 50 billion dollars in 1999. As a result, most states, 33 at least count, are now operating at levels above the generally accepted solvency standard, which says that states should be able to pay for at least one year benefits at peak recessionary levels without taking in additional revenues.

Since 1991, the U.S. average high cost multiple, as the solvency standard is known, increased by almost 50 percent. Thus, it's clear that most states, but not all, are well equipped to handle an expansion of UC benefits, including the Administration's initiative. But the solvency of the state trust funds is, of course, not just about how much money is being spent on benefit expansions, like the family leave program or any other form of reforms now being promoted in the states.

It's also about what's going on the revenue side, where the real action has been happening with the UI program.

Just in the past few years, business groups have successfully lobbied for dramatic cuts in UI taxes in the states. At least 25, according to our latest count, states, according to our latest count, that have cost the UI system literally billions of dollars, far more than what we're talking about for this program.

For example, Georgia enacted tax cuts of one billion dollars over four years. Michigan cut taxes by 750 million. New Jersey cut taxes by 450 million. Washington State cut taxes by 590 million over three years.

As described in the table provided in our testimony at the end of the table, the average rate of employer contributions to the UI system has dropped by one-third since 1994, when the rate started

going down. Thus, the average contribution as a percent of total wages is just 0.57 percent, versus .92 percent in 1994.

Finally, the real question is how much does the reduced tax contribution of employers cost the UI trust fund system. According to our estimates, which are reflected in the bar graph attached to our testimony, the decrease in the contribution rate has cost the UC system 34 billion dollars over the rates as the rate that existed if you calculate the rate—the contributions at the rate that existed in 1994.

That is, if employers had contributed at the 1994 rate of .92 percent for the years 1995 to 1999, the trust funds would have an additional 34 billion dollars available to pay for benefits expansions or to save for a rainy day.

You will note, as well, the contributions by employers have also been steadily going down to the point where they are now less than 20 billion dollars, not counting FUTA taxes.

Thus, since the cost of the program that we're talking about is nowhere near the cost of those tax cuts and other reductions in the rates, it's really about choices that states have to make, whether to continue to provide tax cuts while businesses are already experiencing record profits or to take advantage of this opportunity to expand benefits and update the unemployment system to meet the needs of today's workers.

Thank you again for this opportunity to testify.

[The prepared statement follows:]

Statement of Maurice Emsellem, Director of Public Policy, National Employment Law Project, New York, New York

Good morning, Madam Chairman and members of the Committee. My name is Maurice Emsellem, and I am Director of Public Policy with the National Employment Law Project. Thank you for this opportunity to testify in support of the Administration's action, proposing regulations that authorize the states to provide eligible workers with unemployment benefits while caring for a newborn or newly-adopted child. For the reasons described below, we believe that the proposed regulations represent sound public policy and a critical step forward in the evolution of the unemployment compensation (UC) system.

The National Employment Law Project (NELP) is a non-profit organization that specializes in the unemployment compensation system, the Family & Medical Leave Act of 1993 (FMLA), and other employment laws that are of particular concern to the working poor . We provide technical assistance to state lawmakers and advocates in support of reforms of the UC system. We have published extensively on the unemployment system, including several scholarly articles, a popular resource guide entitled Women, Low-Wage Workers and the Unemployment Compensation System: State Legislative Models for Change (Revised 1997), and a recent state report co-authored with the Institute for Women's Policy Research (IWPR) entitled, The Texas Unemployment Insurance System: Barriers to Access for Low-Wage, Part-Time & Women Workers (February 1999). We are also working with policy-makers in the states as they develop legislation to establish Birth and Adoption, Unemployment Compensation (BAA–UC) programs.

In today's testimony, I will address the following key issues related to the BAA–UC initiative.

1. The BAA–UC initiative is part of a growing movement in the states to expand access to the unemployment system to meet the needs of the changing workforce.

2. BAA–UC advances the goals of the unemployment program to increase attachment to the labor market, especially for low-wage working families.

3. State unemployment laws cover workers who are temporarily separated from their jobs for family reasons and many other circumstances not strictly limited to coverage of the "involuntarily unemployed".

4. As set forth in the proposed regulations, the federal unemployment laws do not preempt the states from enacting BAA–UC programs.

5. With the sustained low unemployment rate, state trust funds are well-equipped to support UC eligibility expansions, including the BAA–UC program.

6. State trust funds are building *despite* dramatic cuts in UC taxes.

• The BAA–UC initiative is part of a growing movement in the states to expand access to the unemployment system to meet the needs of the changing workforce

Over the past several decades, access to the unemployment system has declined to unacceptably low levels due largely to the failure of the program to keep pace with the changing needs of today's workforce. Nationally, the proportion of the unemployed receiving unemployment benefits has dropped from an average of 49% in the 1950s, and over 75% during the 1974–75 recession, to just 35% in the 1990s. As documented by the Advisory Council on Unemployment Compensation and the National Commission on Employment Policy, low-wage, part-time and women workers are the hardest hit by this lack of access to the UC system. The Texas study authored by NELP and IWPR illustrates how these negative trends impact individual groups of workers at the state level. In Texas, only 21% of unemployed women workers received UC. The rate for part-time workers was 8.5% and only 18.4% for low-wage workers, despite the significant labor force attachment of both these groups.

As a result of these conditions and the vast growth in state trust funds caused by the low unemployment rate, a movement has taken hold to expand access to the unemployment program. Just in the past few years, states as politically diverse as Wisconsin, California, New Hampshire, Florida, Massachusetts, Georgia, Washington, North Carolina, New Jersey and Connecticut, have enacted or are now actively debating broad reforms specifically intended to reach more lowwage and women workers."[1] For example, Governor Thompson of Wisconsin recently signed a comprehensive package of UC reforms that included the "movable base period," broader coverage for workers who leave their jobs due to a wide range of family circumstances, and the creation of a study commission to consider options to expand UC for part-time workers.

The BAA–UC initiative, now being considered in eight states (Connecticut, Illinois, Indiana, Maryland, Massachusetts, New Jersey, Vermont, Washington), is part of this growing movement to make the unemployment system more accessible to low-wage and women workers. Although not without its critics, the BAA–UC initiative has successfully generated an unprecedented public debate that has begun to address the many misperceptions about the limits of the unemployment program and spark discussion about the need for reform."[2] Today's hearing provides another critical opportunity to publicize the need to reform the UC system to keep pace with today's workers, and the opportunities to enact BAA–UC programs consistent with the purposes of the federal unemployment laws.

• BAA–UC advances the goals of the unemployment program to increase attachment to the labor market, especially for low-wage working families

As stated in the proposed regulations, the goal of the BAA–UC program is to "help employees maintain or even promote their connection to the workforce by allowing them time to bond with their children and to develop stable child care systems while adjusting to the accompanying changes in lifestyle before returning to work." 64 Fed. Reg. at 67974. The Labor Department's position is supported by the legislative history of the Social Security Act of 1935, reflected in the statement in the Senate Report emphasizing that unemployment benefits "should encourage the regularization of employment." S. Rep. No. 628, 74th Cong., 1st Sess. 16 (1935) (emphasis added)."[3]

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[1] See, e.g., "Jobless Insurance Ready to Take Friendly Turn," *Milwaukee Journal Sentinel*, October 24, 1999; "Labor Seeks to Broaden Unemployment Eligibility," *The Wall Street Journal (Florida Edition)*, June 3, 1998; "Texas Ranks Low in Benefits for the Unemployed," Dallas Morning News, April 14, 1999; "Safety Net Repair: Hole in Jobless Benefits Needs Mending," The Sacramento Bee, September 25, 1997; "Revamping Jobless Benefits Could Ease Welfare Burden," The Sacramento Bee, September 7, 1998.

[2] For example, a *New York Times* editorial (";Paid Leave for Parents," dated December 1, 1999) supported the proposed BAA–UC regulations stating that, "Although unemployment insurance is traditionally seen as helping only those who have been involuntarily laid off and immediately available for work, many states have granted benefits to workers who are not in that narrow category."

[3] Saul Blaustein, in his treatise on the history of the UI system, also emphasizes the key role that unemployment benefits play in maintaining a skilled and productive workforce. According to Blaustein, "The compensation tends to preserve the workforce intact, with its particular skills, training, and experience, until it can be recalled. . .. While this support of workforce retention may somewhat restrict the mobility of labor, it is of value to the employer, as well as to the worker and the community." Saul Blaustein, *Unemployment Insurance in the United States: The First Half Century* (W.E. Upjohn Institute: 1993), at 63.

As described in President Clinton's speech on May 23, 1999 announcing the BAA–UC initiative, large numbers of working families cannot take advantage of the 12 weeks of jobprotected leave provided by FMLA because they do not have the financial means to support their families while on unpaid leave. As the report of the Commission on Family and Medical Leave found, 64% of those who wanted to take advantage of FMLA could not because the leave was unpaid. The absence of paid family leave has had a devastating impact on lowincome families in particular. For example, 21% of those families with incomes of less than $20,000 a year reported having to resort to public assistance given the absence of paid leave. The benefits provided by BAAUC will thus help keep these low-income families who sought to take family and medical leave from losing their attachment to the labor market and falling into poverty. See *California Dept. of Human Develop.* v. *Java*, 402 U.S. 121, 132 (1974) (unemployment benefits are necessary to "maintain the recipient at subsistence levels, without the necessity of his turning to welfare or private charity.").

In fact, years of research in the United States and abroad demonstrates empirically the value of family leave policies to workers and their employers. According to Professor Janet C. Gornick, an expert in family leave policies in Europe and the United States, "paid family leave benefits for new parents strengthen women's labor market attachment, in both the shortand longterm."[4] Specifically, the studies show that access to maternity benefits is strongly associated with new mothers' probability of returning to work within six months of giving birth. Women with access to paid leave were also found to work later into pregnancy and to start working sooner once the infant was at least two months old. In addition, Canada has successfully offered family leave benefits through its unemployment system for many years, covering qualified employees unable to work "due to maternity" (since 1971) and "due to parental caring" (since 1990).

The BAA–UC program thus represents a logical next step in the evolution of the UC system to accommodate the changing circumstances of today's working families. As documented by the successful Canadian experience and the empirical research on paid family leave policies, the BAAUC program will reap significant benefits for workers, their families and employers thereby serving the essential goals of the unemployment system.

• State unemployment laws cover workers who are temporarily separated from their jobs for family reasons and many other circumstances not strictly limited to coverage of the "involuntarily unemployed"

The "involuntarily unemployed" is a phrase that has been relied upon often in this debate in an effort to distinguish BAA–UC recipients from all other claimants who collect unemployment benefits. For the purpose of this hearing, therefore, it is appropriate to explore whether it is true that only the "involuntarily unemployed" are entitled to unemployment benefits. Thus, is it accurate to portray BAA–UC recipients as somehow "pitted" against all other UC claimants? In our view, the phrase "involuntarily unemployed" does not accurately characterize all workers who are covered by today's state unemployment laws. Nor should it, as this narrow statement of the purposes of the unemployment program represents a substantial step backward in the evolution of state UC programs as they develop the flexibility to serve the changing needs of today's workforce.

While the phrase "involuntarily unemployed" is not found anywhere in the federal unemployment laws, it is mentioned in the Senate Report accompanying the Social Security Act of 1935. Putting aside the legal arguments for the moment, we'll explore how this phrase has been applied in actual state practice. This is an important exercise to clarify that the unemployment laws are open to interpretation by the states and that narrow terms do not capture the broad range of state unemployment policies that have been established to respond to the everyday needs of workers, employers, and the labor market more generally. It is also important to correct any public misperceptions about the scope of the unemployment program. Otherwise, fewer workers who now qualify for unemployment benefits will actually apply for benefits, thus contributing to the low "take up" rate for the unemployment program. Already, less than half (45%) of the jobless who have significant labor force attachment apply for unemployment benefits with many believing, incorrectly, that they do not qualify.

Accordingly, we begin by examining how the general rule has been applied to the process of qualifying for unemployment benefits. First, if workers have to be "involuntarily unemployed," are they also entitled under federal law to leave work for compelling family reasons or other reasons not limited to an employer-initiated lay-

[4] Letter of Professor Gornick submitted in support of the BAA–UC regulations, dated January 14, 2000.

off? Yes they are, according to the states. In fact, going back to the early days of the unemployment program, there are numerous examples of state laws that consider an employee's initiation of his or her separation from work involuntary under a broad range of circumstances. About one-third of the states cover compelling personal circumstances requiring an individual to leave his or her job, including many situations that qualify for coverage under FMLA.[5] A number of states also provide benefits to striking workers, which was upheld by the U.S. Supreme Court in the case *New York Tel. Co.* v. *New York State Department of Labor*, 99 S.Ct. 1328 (1979), despite the argument that these workers were "voluntarily" unemployed.

Second, is it always the case that unemployment recipients have to be "able and available" for work to be considered "involuntarily unemployed" and therefore qualify for UC? Again, the states have seen fit to create appropriate exceptions from this rule especially where, as in the case of the BAA–UC program, the goal is to increase attachment to the labor market. For example, as described in the proposed regulations, at least eight states now provide unemployment benefits to workers on temporary layoff. Not unlike the situation of those taking a family leave, the states in this situation have made the decision that it is not always good public policy to require workers to accept new work—even a superior job, with better pay and benefits—when the worker, in fact, still retains a connection, a commitment of employment, with his or her current employer. This rationale applies as well to the 22 states that exempted workers in training programs from having to meet the work-search rules before this policy was adopted as the law of the land in 1976.

Finally, by generally limiting unemployment benefits to those who are "involuntarily unemployed," are states prevented from providing benefits to workers who are not necessarily "unemployed"? Again, states have acted within their discretion to define these terms broadly. Indeed, there are many circumstances where workers are entitled to unemployment benefits while maintaining an on-going relationship with their employers, as in the case of BAA–UC. For example, nearly all states operate a "partial" unemployment program, meaning that benefits are paid to workers who are still employed but whose hours have been reduced below full-time. The same is true of "short-time compensation" or "work-sharing" programs that have been adopted by at least 17 states, where unemployment benefits are paid to current workers whose hours were reduced in order to avoid layoffs. The state courts have also decided several cases in which unemployment benefits were provided to "unemployed" workers who were only temporarily separated from their jobs yet still received job-related benefits, as in the case of the BAA–UC program."[6]

While everyone may not agree with all the policy decisions described above, the point is that many states have expanded the scope of their unemployment programs to serve not just those workers who are narrowly defined as the "involuntarily unemployed." The states have put in place unemployment programs that expand the flexibility to serve a wide variety of employment needs, including family and workforce development needs. By expanding the scope of the program, the states have not "pitted" one group of workers against another. To the contrary, they have created a situation where the program benefits a greater proportion of those in need. Similarly, in the case of the BAA–UC program, the states are taking advantage of their flexibility to expand the program to serve newly-defined needs. Thus, while everyone may not agree with the merits of the BAA–UC program, it is not accurate to conclude that those states that have proposed such legislation are acting outside their rights to expand benefits beyond a narrowly defined group of the "involuntarily unemployed."

• As set forth in the proposed regulations, the federal unemployment laws do not preempt the states from enacting BAA–UC programs

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[5] Thus, under many state laws, an individual who is unemployed as a result of compelling family or medical reasons is considered to be involuntarily unemployed. For example, the Massachusetts unemployment statute provides that, "[a]n individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the director that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary." Mass. Gen. Laws Ann., c. 151A, Section 25(e), para. 2 (emphasis added).

[6] See, e.g., *Donahue* v. *Dept. of Employment Security*, 142 Vt. 351, 355 (1982) (awarding benefits to an "unemployed" group of hourly paid, nonprofessional school employees during the three weeks of Christmas, mid-winter and spring vacations observed by the Vermont public schools); *Pennsylvania Electric Company* v. *Board of Review*, 450 A.2d 779 (Pa. Cwmwlth. 1982) (awarding benefits to an "unemployed" woman who was granted an unpaid leave when she became pregnant and presented medical certification that her job threatened the safety of the fetus, during which time she continued to receive holiday pay, life insurance and hospitalization coverage).

The states have exercised vast discretion in developing unemployment laws to meet the needs of today's workers, including unemployment policies designed to reach beyond a narrowly-defined group of "involuntarily unemployed" workers. Thus, as set forth in the proposed regulations, the federal unemployment laws also allow for the adoption of BAA–UC programs. Rather than restate the legal analysis of the U.S. Department of Labor in support of this position, we take this opportunity to underscore certain key legal issues.

First, the U.S. Supreme Court has consistently held that the states are provided with the discretion under the Social Security Act of 1935 to decide basic issues of eligibility unless specifically prohibited by federal law. This rule was upheld most recently in the case of *New York Tel. Co.* v. *New York State Department of Labor*, 99 S.Ct. 1328 (1979), the decision upholding the right of states to provide unemployment benefits to striking workers. The Court cited several prior decisions and concluded that, "These cases demonstrate that Congress has been sensitive to the importance of the State's interest in fashioning their own unemployment compensation programs, especially their own eligibility criteria." Id. at 1340 (emphasis added). Thus, "when Congress wishes to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the State's freedom to legislate in this area."

Accordingly, DOL's interpretation of the federal unemployment laws as set forth in the BAA–UC regulations is clearly supported by a consistent line of U.S. Supreme Court decisions directly addressing the right of the states to determine the scope of their eligibility rules . The case in support of the agency's action is even more compelling given the absence of any explicit reference in the federal statutes to the terms "involuntary unemployment" or "able and available" for work. Finally, the law is clear that the interpretation of the federal unemployment statutes by the U.S. Labor Department is entitled to great deference. Certainly, the agency's action is not "arbitrary and capricious," which is the standard that applies to overrule a regulation properly promulgated pursuant to the federal Administrative Procedures Act (APA).

• With the sustained low unemployment rate, state trust funds are well-equipped to support UC eligibility expansions, including the BAA–UC program

The decision to expand UC is made by each state legislature based on a balancing of many factors, including the solvency of their UC trust funds, the projected funding coming in and benefits being paid out, the UC tax structure, the size of the new program, and its projected cost. Based on this analysis, most states—but not all—are well prepared to support UC eligibility expansions, including the BAA–UC program.

The cost considerations of the BAA–UC program will vary significantly from state to state, depending on the scope of coverage, the number of weeks of benefits provided, birth rates, UC "take up" rates, and each state's benefit levels. For example, some states have proposed benefits lasting just six weeks, while others have proposed providing benefits for a maximum of 12 weeks. DOL, in the proposed regulations, estimates that the BAA–UC program would cost in the range of zero to $68 million. The higher estimate optimistically assumes that all the states which introduced legislation last year will actually enact the program. In individual states, the cost of the program ranges from $1 million in Vermont to $34 million in Massachusetts.

Since the end of the last recession in 1992, state trust fund reserves have increased significantly as the unemployment rate has remained consistently low (now at just 4.1%). This makes it possible to advance a range of UC expansions to bring the rates of access back up to more acceptable levels, especially for women, parttime and lowwage workers. State trust fund reserves have almost doubled since the end of the last recession, growing from $26 billion in 1992 to over $50 billion in 1999. And since the economy show no signs of slowing down significantly, the trust fund reserves are expected to continue to build as long as the unemployment rate remains low.

As measured by the generally-accepted solvency standard, most state trust funds are thus well-positioned to handle UC expansions including the BAA–UC program. The standard, known as the "average high cost multiple" (AHCM), measures the number of years that a state can pay UC benefits at peak recessionary levels. The recommended AHCM is 1.0, meaning that a state trust fund can afford to pay at least one year of benefits during a severe recession without collecting any additional revenues. The AHCM for the states has increased by 48% since 1992, now averaging .93. As of the end of 1999, 33 states were above the trust fund solvency standard.

• State trust funds are building *despite* dramatic cuts in UC taxes

The state trust funds would be even more solvent, and even better equipped to handle long-overdue UC expansions, were it not for the record level of UC tax cuts that have been enacted in recent years.

At the same time that U.S. businesses are experiencing optimal profits, they have also been lobbying aggressively, and successfully, for dramatic cuts in state UC taxes. According to a recent tally prepared by NELP, at least 25 states have cut UC taxes dramatically over the last few years. Not surprisingly, therefore, the average rate of employer contributions has dropped by one-third, from .92% of total wages in 1994 to just .57% in 1999. (See the attached table for more detail on the yearly drop in the rate and the state figures). According to our estimates, employers would have contributed almost $34 billion more into the state UC trust funds for the years 1995–1999 if they had continued to be taxed at the 1994 contribution rate.

The following examples illustrate the dramatic impact that UC tax cuts have had on the state trust funds:

• In 1998, Georgia enacted a tax cut costing the trust fund $122 million over the next two years. In 1999, the Governor signed legislation to further cut UC taxes by $1 billion over the next four years.

• In 1998, Idaho enacted legislation that cut UC taxes by $31 million in 1998 and by a projected $112 million over the next fours years, reducing the rate of the UC tax by 30%.

• In Illinois, the UC tax rate was cut by 16% in 1996, costing the trust fund $128 million. Legislation has been proposed to reduce the rate this year by another 12%, with an impact of $150 million.

• In 1995, a tax cut was enacted in Maryland that the Governor estimates will save employers $410 million over five years.

• At the end of last year, the Massachusetts Governor sought a UC tax cut of $203 million, while the Legislature agreed instead to freeze a scheduled tax increase thereby costing the trust fund $120 million.

• In 1996, Michigan enacted a 10% cut in its UC tax rate, costing the trust fund about $500 million over three years. The 1996 legislation included a provision for future cuts in the event that the fund balance continued to rise, causing a second round of cuts costing the trust fund $750 million since 1996.

• In 1996, UC taxes were reduced in New Jersey costing the trust fund $200 million a year, which was followed by a second round of cuts in 1997 resulting in a total tax cut of $450 million a year.

• In 1998, New York employers received a $420 million tax break, reducing the average UC tax rate by 27%.

• In 1998, South Carolina cut its UC taxes by 50%, costing the trust fund an estimated $50 million.

• In 1999, Washington froze its tax base at 1999 levels, stopped an automatic shift to a higher tax schedule, and provided additional tax reductions for employers in some rate classes. These tax cuts will cost the trust fund $590 million over six years.

For today's hearing, we have also prepared an estimate that documents the impact of the reduced tax rates of the past several years on the state trust funds. We found that, if taxed at the 1994 U.S. average rate of .92% on total wages, employers would have contributed almost $34 billion more into the state UC trust funds for the period from 1994–1999 (i.e., $159 billion as opposed to $126 billion). (7 As reflected in the attached graph, it is significant that the amount of actual employer contributions has in fact been going down over these years, and the gap between actual contributions and estimated contributions at the 1994 tax rate is growing substantially. *Despite* these reduced employer contributions, the state trust funds are still building as a result of the low unemployment rate.

Unfortunately, the data does not exist to document precisely the impact of tax cuts alone on the trust funds. Thus, given the data limitations, our estimate also takes into account the impact of experience rating on the tax rates (which generally brings down the tax rate for those employers who are laying off fewer workers), and the automatic triggers that exist in some states that decrease or increase the tax rates depending on the solvency of the trust fund. Therefore, while not an estimate

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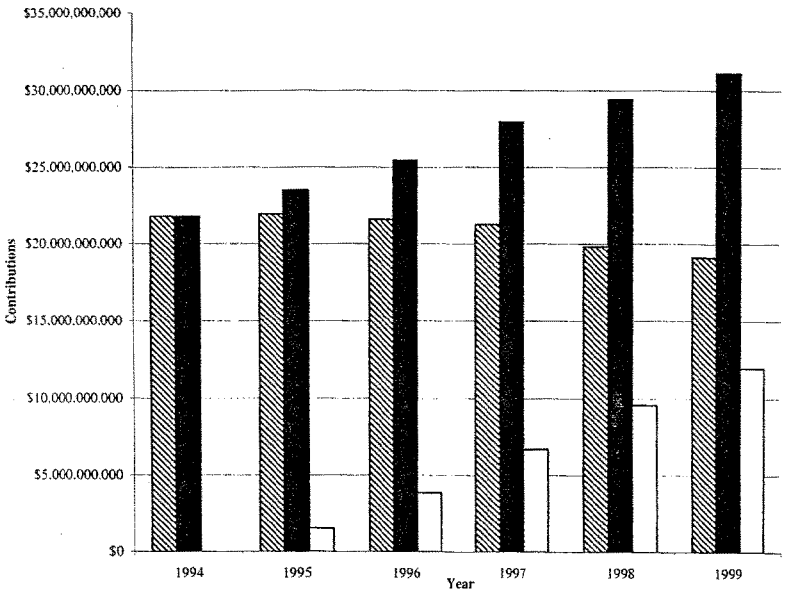
[7] These estimates were prepared with data provided by the U.S. Department of Labor, the only national data documenting UC tax rates and contributions. We calculated the dollar amount of employer contributions that would have been deposited in state trust funds had employers been taxed at the 1994 U.S. average rate of .92% of total wages, which is the year when the average tax rate started declining (see attached table). This calculation was then made for each of the years from 1995 to 1999, and the results were added together to arrive at the $34-billion figure. The contributions included in the calculation are only for experience-rated employers, and they do not include FUTA taxes. graphic*

of the impact of tax cuts alone, the calculation accurately reflects the significant impact on the trust funds of the reduced tax burden on employers over the years 1994 to 1999.

Ironically, many business groups have been highly critical of the BAA–UC initiative, claiming that it will result in a "raid" of state UC trust funds. For example, in Massachusetts, business interests are opposed to the expansion of UC to cover workers on family and medical leave, yet they have actively lobbied for a UC tax cut that would have cost the UI trust fund $203 million. According to state labor department officials writing in support of the tax cut proposal, "the current status of the Massachusetts UI Trust Fund is extremely positive, and a better time for taking additional action to keep UI costs down could hardly be found." These business and state officials are, of course, hard pressed to demonstrate how the trust fund can handle these massive tax cuts if they cannot afford reforms expanding access to the UC system, including UC to cover workers on family leave.

Madam Chairman and members of the Committee, thank you again for this opportunity to testify in support of the BAA–UC initiatives in the states and the Labor Department's proposed regulations.

Comparison of Actual Employer Contributions to State Unemployment Trust Funds for the Years 1994-1999* With the Estimated Yearly Contributions Calculated at the 1994 Tax Rate



▨ Actual UI Contributions
■ Estimated UI Contributions (based on the 1994 rate as a percentage of total wages (0.92%))
□ Difference Between the Actual and Estimated UI Contributions (totalling $33,646,646,000)

Source: U.S. Department of Labor, Employment and Training Administration
Based on calculations prepared by the National Employment Law Project
*The 1999 U.S. average contribution rate as a percentage of total wages was estimated by the U.S. Department of Labor.

UI Tax Rates as a Percentage of Total Wages
by State for the Years 1994 through 1999

	CY1999	CY1995	CY1996	CY1997	CY1998	CY1999*	Change ('94–'99)
US	0.92%	0.86%	0.78%	0.70%	0.62%	0.57%	–38.48%
AL	0.36	0.37	0.34	0.34	0.44	0.39	8.42%
AK	1.66	1.71	1.77	1.88	1.63	1.65	–0.35%
AZ	0.61	0.61	0.52	0.47	0.38	0.32	–47.06%
AR	0.95	0.88	0.83	0.83	0.81	0.78	–17.56%
CA	0.98	0.96	0.94	0.76	0.66	0.62	–36.36%
CO	0.53	0.47	0.40	0.38	0.33	0.32	–38.91%
CT	1.21	1.26	1.23	1.18	1.10	0.66	–45.41%
DE	0.83	0.86	0.72	0.68	0.56	0.55	–33.75%
DC	1.03	0.92	0.79	0.50	0.54	0.56	–45.22%
FL	0.65	0.58	0.50	0.45	0.32	0.34	–47.12%
GA	0.56	0.48	0.45	0.37	0.30	0.15	–73.36%
HI	0.76	1.60	1.46	1.33	1.25	1.23	61.65%
ID	0.95	0.92	1.21	0.92	0.77	0.73	–22.78%
IL	1.10	1.01	0.78	0.73	0.68	0.64	–41.43%
IN	0.42	0.41	0.38	0.39	0.32	0.37	–11.62%
IA	0.69	0.51	0.51	0.50	0.50	0.50	–26.88%
KS	0.76	0.16	0.12	0.13	0.13	0.13	–82.64%
KY	0.78	0.75	0.72	0.72	0.68	0.63	–19.41%
LA	0.70	0.64	0.57	0.54	0.48	0.42	–39.40%
ME	1.45	1.27	1.23	1.03	1.13	1.12	–22.45%
MD	1.18	1.08	0.77	0.54	0.48	0.48	–59.17%
MA	1.53	1.43	1.31	1.30	0.94	0.76	–50.59%
MI	1.46	1.34	1.09	0.98	0.80	0.77	–46.95%
MN	0.94	0.79	0.66	0.60	0.55	0.51	–45.94%
MS	0.85	0.77	0.48	0.43	0.50	0.56	–33.72%
MO	0.94	0.70	0.66	0.61	0.55	0.43	–54.74%
MT	0.95	0.95	0.87	0.86	0.86	0.87	–8.05%
NE	0.31	0.27	0.30	0.34	0.14	0.18	–41.74%
NV	0.91	0.89	0.89	0.84	0.81	0.81	–10.98%
NH	0.72	0.48	0.31	0.20	0.20	0.18	–74.82%
NJ	0.83	0.87	1.16	1.14	0.96	0.82	–0.65%
NM	0.86	0.72	0.72	0.74	0.75	0.63	–26.56%
NY	1.10	1.02	0.94	0.84	0.61	0.56	–48.97%
NC	0.34	0.28	0.10	0.31	0.35	0.36	5.89%
ND	0.65	0.61	0.45	0.46	0.59	0.62	–5.17%
OH	0.95	0.91	0.76	0.54	0.51	0.46	–51.56%
OK	0.53	0.49	0.40	0.32	0.17	0.18	–66.06%
OR	0.96	0.85	1.28	1.23	1.24	1.26	31.32%
PA	1.72	1.57	1.27	1.13	1.07	1.01	–41.01%
PR	1.51	1.52	1.56	1.53	1.44	1.36	–9.80%
RI	2.09	2.07	2.05	2.00	1.85	1.55	–26.01%
SC	0.64	0.63	0.62	0.60	0.42	0.41	–35.57%
SD	0.21	0.21	0.20	0.21	0.21	0.20	–4.77%
TN	0.59	0.55	0.50	0.46	0.46	0.43	–27.76%
TX	0.62	0.60	0.52	0.47	0.43	0.38	–38.63%
UT	0.59	0.55	0.50	0.42	0.36	0.27	–53.82%
VT	1.10	0.95	0.91	0.89	0.85	0.84	–23.54%
VA	0.48	0.45	0.36	0.26	0.17	0.16	–66.74%
VI	1.09	1.44	1.67	1.69	0.94	0.62	–43.01%
WA	1.22	1.16	1.10	1.19	1.19	1.17	–3.86%
WV	1.12	1.08	1.06	1.03	1.01	1.00	–10.63%
WI	0.90	0.84	0.79	0.74	0.68	0.68	–24.58%
WY	0.74	0.73	0.72	0.75	0.74	0.55	–25.38%

Source: U.S. Department of Labor, Employment and Training Adminustration.
Based on calculations prepared by the National Employment Law Project.
*The 1999 average contribution rates as a percentage of total wages were estimated by the U.S. Department of Labor.

Chairperson JOHNSON. Thank you. Mr. Shimkus.

STATEMENT OF TODD L. SHIMKUS, VICE PRESIDENT, NORTH CENTRAL MASSACHUSETTS CHAMBER OF COMMERCE AND U.S. CHAMBER OF COMMERCE

Mr. SHIMKUS. Thank you, Madam Chair. I am here representing the U.S. Chamber and the North Central Massachusetts Chamber of Commerce, where I am the Vice President. That organization includes 1,500 members in 14 communities about 40 miles west of the big dig, which I'm sure you're all familiar with.

My mission in being here today is really to protect the solvency of our state's UI trust fund, for if we fail this test, it is our working families, whether they are small employers or employees, who will pay the price in lost jobs and lost opportunity.

This initiative or this experiment, as the Department calls it, if it's implemented, will cost Massachusetts employers or will divert 200 million dollars per year from our UI trust fund. That's 200 million dollars, according to the Division of Employment and Training in Massachusetts, testimony given last year by Jack King, the Director. That is unsound and unwise.

Now, why am I here from Leominster, Massachusetts, the birthplace of Johnny Appleseed? What added value can I bring to this discussion?

I think there's three things. First of all, Massachusetts is clearly one of the most likely test tubes in which this experiment will be conducted. Second, our region of Massachusetts is very unique. We make things. Look at the clock back here, Simplex, it's a Westminster company.

Chances are the countertop is a laminated paper made at Montro Paper Décor in Fitchburg. Plastics is a huge part of our local industry. Thirty percent of our folks that live in north central Massachusetts make things and are employed in the manufacturing sector.

As a result, when there are bad times, when there are hard times in our state and our nation, those times are even harder in north central Massachusetts and we simply can't afford to make them any harder on those working families who are relying on the security that's provided by the unemployment insurance trust fund.

Lastly, our chamber has been a leader in efforts on unemployment insurance reform. We were the only business organization in the State of Massachusetts a number of years ago to support the bifurcation of the unemployment insurance trust fund in order to provide worker training for existing employees, those folks who are already on the shop floor.

How can our regional chamber support that initiative, but not this experiment? Let me give you a couple of reasons. First of all, the workforce training fund that was established by bifurcating the system cost employers about 18 million dollars a year. Remember, the cost, according to the Division of Employment and Training in Massachusetts, for this experiment is 200 million. That's a big, big difference.

But more important, the goal of bifurcating and the workforce training fund is to protect and enhance the solvency of the UI trust

fund. How does it do this? It does it in two ways. First of all, you have better trained and skilled employees. You improve the innovation capacity of local firms so that they can succeed, grow and thrive. Second, the improved skills of those workers helps them should they ever be involuntarily laid off.

The hope is that they have marketable skills so that they have to be less reliant on the unemployment insurance trust fund. So by helping firms to compete and by helping employees to compete, we are making a difference, protecting the solvency of our UI trust fund.

Now, some researchers have claimed that this experiment would strengthen worker attachment, improve loyalty and morale. That may be all well and good, but that doesn't protect the solvency of the UI trust fund in Massachusetts, a trust fund that's going to see 200 million dollars drained from it if this experiment goes forward.

Don't misunderstand. Our employers do a great deal to be good corporate citizens in north central Massachusetts and across this country. In Massachusetts, to bring it back to our state's example, we have had rates frozen for the last two years. They've been frozen, we have been told, by legislative leaders because there aren't sufficient funds to allow for a rate decrease.

Well, if there aren't sufficient funds to allow for a rate decrease, chances are there's not sufficient funds to allow for a 200 million dollar drain, either.

If you look at how much it costs to be an employer in Massachusetts, you get a real sense of how dedicated these folks are. Just a couple of comparisons. In our state, an employer pays, on average, about 308 dollars per year for unemployment insurance. In Connecticut, 251; in California, 245; Michigan, 281; Florida is 55 dollars; and New Hampshire, which we border, 63.

Why are our costs so much higher than others? Because we provide significant benefits. The most generous benefits in the country. In fact, we're the first state to offer family health care to those folks who are unemployed and are collecting benefits through the unemployment insurance trust fund.

So we're proof. If you provide more benefits, it equals higher rates and then there's less investment in the economy. There's no better case to show that and to prove that than Massachusetts.

If I could, I just want to conclude with one final comment. In order to establish both the workforce training fund and the health care program, family health care program that I talked about, employers in both instances in Massachusetts were required to pay separate new taxes. They pay a separate fee, a flat rate contribution in addition to their UI taxes in order to fund the worker training program and there is another separate employer contribution in addition to those in order to provide health care benefits.

That tells me that we need to have Congressional action if we're going to move forward and that the rulemaking process is simply a means of expediting something that is going to be very detrimental to our members, their employees, and our communities.

So with that said, this initiative, this experiment is not a test we should fail, it's not a test we should take, and, in fact, it's inappropriate, too costly, and potentially divisive, as it may pit neighbor

against neighbor looking for benefits in north central Massachusetts.

So I urge you to do whatever you can and, Madam Chairperson, if I could, I would absolutely love to adopt you and bring you to Massachusetts as one of our Congressmen, from your comments today.

[The prepared statement follows:]

Statement of Todd L. Shimkus, Vice President, North Central Massachusetts Chamber of Commerce and U.S. Chamber of Commerce

I. INTRODUCTION

Chairperson Johnson and Members of the Subcommittee, thank you for your kind invitation. I am pleased and honored to be here to testify on behalf of the U.S. Chamber of Commerce and the North Central Massachusetts Chamber of Commerce, where I am the Vice President. The U.S. Chamber of Commerce is a business federation representing more than three million businesses and organizations of every size, sector and region. In fact, our regional chamber of commerce, which has 1,500 businesses who employ in excess of 25,000 people in 14 local communities, is one of those regional organizations.

As a representative of employers in the Commonwealth of Massachusetts, a State considered by proponents and opponents alike as one of the most likely testing centers for this "experiment," I am here today to emphatically state our opposition to the BAA–UC initiative to divert unemployment compensation funds to employees on parental leave because it is unsound public policy. At the same time, we are convinced that the rulemaking process being used to enact this "experiment," as the Department of Labor has called this initiative (64 Fed. Reg. 67974), is entirely inappropriate and unlawful. In particular, we find this "experiment" to be too costly, potentially divisive within communities, and a threat to jobless workers and employers who have been protected by law and the actions of the Congress for the past 65 years.

II. BAA–UC: AN UNWISE SOCIAL POLICY EXPERIMENT

In 1998, our regional Chamber was the only business organization in Massachusetts to support an initiative calling for the bifurcation of our state's unemployment insurance trust fund in order to provide a limited amount of dollars, $18 million annually, for incumbent worker training. In fact, it was our Chamber's Plastics Council that first suggested to State Senate President Birmingham, the bill's sponsor at a breakfast one year earlier, that such an initiative be launched.

While some may suggest that this initiative itself demonstrates that states deserve wide latitude with respect to the use of their trust funds, I want you to understand that our regional chamber views the BAA–UC initiative in a far different light. Our support for the Massachusetts Workforce Training Fund was predicated on our belief that the best way to expand economic opportunity is through improving the skills of existing employees and their employer's aggregate innovation capacity. With 98 percent of all state training funds directed towards those on welfare or unemployed prior to 1999, we remain confident that our ability to expand economic opportunity in Massachusetts is being enhanced by this infusion of new public funds to encourage new private investment for incumbent worker training.

The North Central Massachusetts Chamber's support for the Workforce Training Fund initiative was further predicated on our belief that these new private and public investments will protect the long-term solvency of the UI trust fund. In other words, improving the skills of existing employees will initially help their companies to succeed, grow and thrive, thereby, decreasing the potential that these companies will fail and need to involuntarily lay-off their employees. Should such innovation fail to prevent employees from being involuntarily laid-off, it is our expectation that the skills these employees acquired through this investment in training will provide them with a new set of marketable employment qualifications so as to further reduce the amount of time they will need UI benefits.

The BAA–UC experiment is not a reasonable or prudent corollary to this already successful initiative. While some proponents of BAA–UC may argue that paid FMLA benefits using UI trust funds is similar because it might improve employee morale or help a company to retain skilled employees, it fails to meet the second key component that gave our regional members the confidence to support the bifurcation of Massachusetts' UI trust funds. Specifically, the diversion of UI trust funds to pro-

vide paid family leave will not improve either the employment skills of those employees or the aggregate innovation capacity of their employers. Furthermore, this diversion of funds does not result in employee promotions or wage and benefit increases, as the successful completion of training programs often does. Nor will such a diversion of funds reduce the amount of time UI benefits will need to be paid to an employee facing an involuntary lay-off.

To make matters much worse, this experiment will cost a great deal more than its proponents have calculated. According to the Massachusetts Division of Employment and Training, implementing the BAA–UC experiment in our state will divert at least $200 million, about seven times as much as the DOL estimates, in unemployment benefits from those who are involuntarily laid-off to provide employees (regardless of income) with partial wage replacement while they take leave following the birth or adoption of a child.

With respect to the real cost of BAA–UC, I want to emphasize that this experiment is too expensive even in these "good" times. As those of us on the front lines of community economic development understand, while the technology sector may be booming and the Internet is creating new opportunities never before dreamed possible, our more mature industries continue to face significant challenges. From traditional manufacturers to downtown retail stores, our local business environment and community in general is at a crossroads. While the stock market may continue to soar, it is these small employers, the ones who are an integral part of our region's quality of life, who are in harms way as the economy "as we know it" transforms.

In this environment, it is clearly rational for employers and business organizations, such as the U. S. Chamber and our regional Chamber, to both oppose the BAA–UC experiment and to support UI tax rate reductions. On the one hand, the $1.8 billion balance in our state's trust fund is sufficient to provide some support to these traditional employers by allowing for a $90 million tax reduction effective January 1, 2001. At the same time, the $200 million annual cost of diverting UI funds for a new social experiment far outweighs the benefits to these small to mid-size employers and their employees.

What troubles us even more is that the BAA–UC experiment, if it does dramatically reduce UI trust funds in states like Massachusetts, will end up placing out-of-work Americans in direct competition for UI benefits with their more economically secure neighbors who have jobs and want the benefit of partial wage replacement while they take voluntary leave. There is an old saying: "If it ain't broke, don't fix it." Well, we have 65 years of proof that, while not perfect, the Unemployment Compensation system works. The BAA–UC experiment is entirely inconsistent with this 65 years of experience. The BAA–UC experiment is too costly, has great potential to be divisive and is a real threat to the economic well being of employees and employers. Therefore, the diversion of UI trust funds to pay employees on parental leave is unsound public policy.

III. BAA–UC: The Rulemaking Process is Unlawful and Inappropriate

Before I cite the numerous legal principles circumvented by the BAA–UC experiment, I feel compelled to offer my sincere gratitude to Chairperson Johnson and the Subcommittee for the opportunity to voice our members' concerns in a public forum. It is important to note that the use of the rulemaking process has precluded Congressional deliberation on this important issue. Furthermore, the repeated calls from numerous organizations both inside and outside of the Beltway for field hearings has been ignored by the Department of Labor. Noting the potential cost and divisive consequences of this experiment, the use of the rulemaking process is inappropriate because of the lack of public deliberation and debate in those regions of the country, like North Central Massachusetts, where because of unique community economic circumstances, this experiment may do far more harm than good!

The Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq.(FUTA), requires state programs to satisfy certain minimum criteria. One of the fundamental requirements imposed by federal law is that money made available through this system be used solely for the payment of "unemployment compensation." FUTA, 26 U.S.C. § 3304(a). Under these circumstances, the term "unemployment" has acquired a well-established and understood meaning which requires that all unemployment compensation claimants be (1) without a job; (2) able and available to work; and (3) unemployed involuntarily, (which normally includes the requirement that claimants be actively seeking work).

The proposed regulations cannot be reconciled with these requirements. BAA–UC explicitly proposes to provide payments of unemployment compensation to employees who have jobs but are simply taking temporary parental leave, who are not available for work and who left their jobs voluntarily but are not seeking work. This

regulation effectively strips "unemployment" from unemployment compensation. The legislative intent here is clear—Congress has not delegated the authority to the Department of Labor to carve out exceptions to the fundamental requirements of joblessness, availability, and involuntariness imposed on state UC programs, where those exceptions are directly contrary to Federal unemployment compensation law.

The proposed regulations boldly acknowledge that BAA–UC is designed to "provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child" (64 Fed. Reg. 67972). As the U.S. Chamber of Commerce established in its written comments opposing BAA–UC, submitted to the Department of Labor on February 2, 2000,* this objective is wholly incompatible with the purpose of unemployment compensation, and the requirements of joblessness, availability, and involuntariness which are intended to prevent the diversion of UC funds for other governmental experiments and purposes. Moreover, this frank admission of intent demonstrates that the BAA–UC stands as a direct challenge to Congressional judgment and intent.

Thus, in enacting the Family and Medical Leave Act of 1993, Congress considered whether family leave should be paid or unpaid and expressly provided that, as regulated by the Federal government, the right to leave "because of the birth of a son or daughter" (29 U.S.C.§ 2612 (a)(1)(A)) should be unpaid (29 U.S.C. § 2612(c)(d)). Accordingly, the BAA–UC, which authorizes states to pay parents on parental leave out of unemployment compensation funds, is an impermissible attempt to make an end-run around the considered judgment and authority of Congress.

Lastly, our regional Chamber understands from experience just how limiting the existing Federal law can be with respect to Unemployment Compensation. As I mentioned earlier, we supported the use of a limited amount of the UI trust fund balance for worker training. Yet, Federal law did NOT allow Massachusetts to simply divert funds for even this directly work-related purpose. In order to establish the Massachusetts' Workforce Training Fund, the legislation we supported established a new surcharge on employer UI taxes. This surcharge, in fact, provided the $18 million that is annually placed into a separate fund for the training purposes set forth in the state legislation.

With this in mind, we are confident that, based on law and our own experience, the Department of Labor's use of the rulemaking process in this case is both inappropriate and unlawful. By using the rulemaking process to implement the BAA–UC experiment, the Department of Labor is seeking to circumvent both Congressional intent and a full public debate on the merits and costs of this experiment. Moreover, the BAA–UC experiment ignores a volume of evidence which suggests that such a diversion of funds may jeopardize the "security blanket" for the unemployed and pit the unemployed against their more fortunate neighbors who have a job but voluntarily choose to take parental leave.

IV. Conclusion

For the foregoing reasons, the U.S. Chamber of Commerce and the North Central Massachusetts Chamber of Commerce strongly oppose the BAA–UC initiative and urge the Congress to take all appropriate action to protect employees and employers from the implementation of this costly, divisive and inappropriately implemented "experiment."

*Excerpts from the Comments of the U.S. Chamber of Commerce are attached hereto as Exhibit #1 (Exhibit 1)

U.S. Chamber of Commerce

[Excerpts from letter to Grace Kilbane, Director of Unemployment Insurance Service, U.S. Department of Labor, from U.S. Chamber of Commerce, February 2, 2000]

Re: Proposed Regulations on Birth and Adoption Unemployment Compensation

The U.S. Chamber of Commerce (the Chamber) submits the following comments in opposition to the Department of Labor's (DOL) proposed regulation on Birth and Adoption Unemployment Compensation (BAA–UC) published in the Federal Register at 64 Fed. Reg. 67972 et seq. on December 3, 1999.

Statement of Interest

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. The BAA–UC rule authorizes states to divert unemployment compensation funds to parents, for up to 12 to 26 weeks or more, who voluntarily take leave from work or quit their jobs in order to be with

a newborn or newly adopted child. This proposal will have a substantial, detrimental impact on our members, who will be forced to pay for BAA–UC benefits through higher payroll taxes.

REASONS WHY THE BAA–UC PROPOSED RULE SHOULD BE WITHDRAWN

It is both unlawful and bad public policy to divert unemployment compensation (UC) funds to employees on parental leave. Federal law has protected jobless workers and employers for over 65 years by assuring that state unemployment trust funds are used for the sole purpose of paying unemployment compensation. DOL's proposed regulation will change the fundamental purpose and nature of the UC program, the safety net for jobless workers, by allowing the expenditure of state unemployment trust funds for the entirely unrelated purpose of compensating employed workers who take parental leave. Their proposal to convert parental leave to paid status using UC funds also contravenes Congressional judgement, expressed in the Family and Medical Leave Act, that such leave be unpaid. In addition, BAA–UC undermines the stability of the unemployment compensation system by imposing staggering new liabilities of up to $36 billion or more per year on a fragile, under-funded unemployment compensation system.

I. FEDERAL UNEMPLOYMENT COMPENSATION LAW PRECLUDES DOL'S ADOPTION OF THE PROPOSED BAA–UC REGULATIONS [1]

Unemployment insurance in each of the 50 states is provided through a cooperative federal-state arrangement in which a federally-collected tax is used to finance state UC programs that meet federal requirements. Although federal law allows states wide latitude in the administration of the unemployment compensation system, it does prohibit states from "depart[ing] from those standards which, in the judgement of Congress, are to be ranked as fundamental." *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 594 (1937). Thus, the Federal Unemployment Tax Act, 26 U.S.C. § § 3301 et seq. (FUTA), requires state programs to satisfy certain minimum criteria "designed to give assurance that the state unemployment compensation law shall be one in substance as well as name." 301 U.S. at 575.

One of the fundamental requirements imposed by federal law is that money made available through this system be used solely for the payment of "unemployment compensation." FUTA, 26 U.S.C. § 3304 (a). This principle is so deeply embedded in the federal-state relationship that Federal law prohibits the use of state trust funds even for the directly related purpose of financing the administrative cost of providing unemployment benefits. Under these circumstances, the term "unemployment" has acquired a well-established and understood meaning: namely, that all unemployment compensation claimants be (1) without a job; (2) able and available to work; and (3) unemployed involuntarily, which normally includes the requirement that claimants be actively seeking work.

The proposed regulations cannot be reconciled with these requirements. BAA–UC explicitly proposes to provide payments of unemployment compensation to employees who have jobs but are simply taking temporary parental leave, who are not available for work and who left their jobs voluntarily but are not seeking work. Indeed, the Model State Legislation included in the Notice of Proposed Rulemaking would preclude the application of the joblessness, availability, and involuntariness requirements to BAA–UC claimants, thereby stripping "unemployment" from unemployment compensation. Moreover, DOL's prior treatment of areas such as temporary layoffs, illness, jury duty, and training do not provide any justification for its attempt in the proposed regulation to turn the unemployment requirement upside down. An agency's authority to interpret the statute it administers is not unlimited. It does not permit any agency to "disregard legislative direction in the statutory scheme(s) that the agency administers." *Heckler* v. *Chaney,* 470 U.S. 821 833 (1985). Moreover, where "Congress has directly spoken to the precise question at issue. . ., that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* v. *Natural Resources Defense Council,* 467 U.S. 837, 842–43 (1984) (fn. omitted). The legislative intent here is clear—Congress has not delegated the authority to the DOL to carve out exceptions to the fundamental requirements of joblessness, availability, and involuntariness imposed on state UC programs, where those exceptions are antithetical to Federal unemployment compensation law.

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[1] A fuller development of this position is found in the comments filed by LPA, Inc., which the Chamber hereby adopts and incorporates herein.

Far from attempting the impossible—reconciling the regulation with the joblessness, availability, and involuntariness requirements—the proposed rule effectively acknowledges that the BAA–UC does not satisfy these requirements. Thus, the Model State Legislation accompanying the BAA–UC provides that individuals on birth or adoption leave shall not be denied unemployment compensation based upon the "availability of work," the "inability to work," or the "failure to actively seek work." 64 Fed. Reg. 67977. Such state legislation is necessary because the proposed payment of unemployment compensation to individuals on birth and adoption leave conflicts with all three aspects of unemployment.

A. THE BAA–UC IS INCOMPATIBLE WITH THE JOBLESS REQUIREMENT

In construing a statute, a Federal agency normally "'look(s) first to its language,'. . . 'giving the words used their ordinary meaning.'" *Moskal* v. *U .S.,* 498 U.S. 103, 108 (1990), quoting *U.S.* v. *Turkette,* 452 U.S. 576, 580 (1981); *Richards* v. *U.S.,* 369 U.S. 1, 9 (1962). In ordinary, everyday usage, the term "unemployment" indicates a state in which one is without a job. Thus, it is clear that, when FUTA refers to "unemployment compensation," it is referring to persons who are without a job.

A parent on BAA–UC leave has a job at the outset of the leave and is guaranteed to have a job at its conclusion. The proposed regulations authorize states to pay unemployment compensation to "parents on approved leave." Approved leave is defined as a "specific period of time, agreed to by both the employee and the employer, during which an employee is temporarily separated from employment after which the employee will return to work for that employer." 64 Fed. Reg. 67976–77. Thus, the proposed regulations contemplate payment of unemployment compensation to persons who "will return to the last employer after a designated period." 64 Fed. Reg. 67975.

Such a payment cannot be reconciled with the requirement that the unemployment funds be "used solely in the payment of unemployment compensation." FUTA 26 U.S.C. § 3304 (a)(4). Persons who are temporarily absent from their employment are not jobless and, hence, are not "unemployed." Employees routinely take time off from their employment for vacations, jury duty, illness, and family matters. These individuals are not without a job and, therefore, are not eligible to receive unemployment compensation. The proposed regulations cite no authority for the proposition that parents or other persons who take approved leave are "unemployed." Indeed, to characterize such persons as unemployed would mean that all individuals who are absent from work for any reason are unemployed as well.

The DOL notes that unemployment compensation has been paid to persons who are "temporarily laid off" because of lack of work and who have an expectation that they will be rehired. See 64 Fed. Reg. 67973. However, those on temporary layoff, do not have a job. At best, such persons have an expectation, and in some cases, a contractual right, to a job if work becomes available in the future. Teachers during the months between school years, and athletes in the off-season are in a position more analogous to individuals taking birth or adoption leave. They have a job but are simply not working for a period. FUTA, however, specifically bars teachers and athletes in such circumstances from claiming unemployment. See 26 U.S.C. §§3304(a)(6)(A), 3304(a)(13). Thus, these situations offer no indication that Congress wished to provide unemployment compensation to persons who have jobs but take temporary leave from them for personal reasons.

B. THE BAA–UC IS INCOMPATIBLE WITH THE "ABLE AND AVAILABLE" REQUIREMENT

Joblessness alone does not capture all aspects of the status of "unemployment" under FUTA. As the proposed regulations acknowledge, one well-recognized aspect of the status of unemployment under FUTA is the requirement that a person be "able and available" for employment. See 64 Fed. Reg. 67972. Thus, the status of "unemployment" implies not only that a person is out of work but also that the individual is available for work (except for temporary illness). It is also implicit in the requirement that persons who are "unemployed" actively seek work.

The able-and-available requirement is reflected in other FUTA provisions as well. For example, FUTA Section 3304(a)(8) prohibits states from denying compensation to otherwise eligible individuals who are participating in a state-approved training program. See 26 U.S.C. § 3304(a)(8). This provision states that compensation shall not be denied "because of the application, to any such week in training, of state law provisions relating to availability for work. . .or refusal to accept work." Id. Obviously, this exemption assumes the existence of an availability requirement because, without such a requirement, there would be no need for an exemption.

FUTA also requires that unemployment compensation be "paid through public employment offices." FUTA, 26 U.S.C. § 3304(a)(1). As the purpose of such offices is to find people jobs, this provision ties the payment of unemployment compensation to that individual's availability for work. See 64 Fed. Reg. 67972. Thus, the statutory context confirms that, for purposes of FUTA, the availability of an individual for work is an integral part of the status of unemployment.

The cornerstone to ensuring that UC trust funds will only be paid to those involuntarily unemployed, but seeking new employment, is the well-established requirement that recipients be available for work. Clearly, employees voluntarily taking parental leave are not available, fail to satisfy the second requirement for unemployment, and, therefore, should be barred from receiving UC benefits. Given the decision of a parent to leave work and devote time to a newborn or newly adopted child, the parent is clearly not available for work during the leave period. The parental leave proposal acknowledges as much by noting that BAA–UC claimants are parents who "wish to take approved leave" and by including in the definition of "approved leave" the fact that claimants are "temporarily separated from employment." 64 Fed. Reg. 67972, 67974 (emphasis added). It is also telling that the proposed regulations do not require BAA–UC claimants to register with the public employment offices. Thus, the proposed regulations clearly conflict with the requirement that unemployment compensation claimants be "available" for work and remain attached to the labor force in accordance with the fundamental purposes of the UC statutes.

C.The BAA–UC is Incompatible with the Involuntariness Requirement

The final requirement of the tripartite rule governing the status of "unemployment" is involuntariness, which is the requirement that an individual be seeking work. Most unemployment compensation laws also disqualify individuals from receiving unemployment benefits when they leave their employment voluntarily without good cause attributable to their work. See, e.g., *Wimberly* v. *Lab. and Indus. Rel. Comm'n of Missouri,* 479 U.S. 511, 515 (1987) (Employee who left her job due to pregnancy properly denied UC benefits). This aspect of the status of unemployment reflects common usage. The context in which the term unemployment appears in FUTA makes it clear that the term is being used in this involuntary sense. For example, as noted above, FUTA requires unemployment compensation to be paid through public employment offices. As the proposed rule recognizes, because the purpose of such offices is to find people jobs, this requirement "ties the payment of UC to an individual's search for employment." The provision prohibiting states from denying compensation to otherwise eligible individuals involved in job training programs because of state law provisions "relating to. . .active search for work" further illustrates the linkage between the UC payments and the pursuit of employment. FUTA, 26 U.S.C. § 3304(a)(8). Just as the exemption for provisions relating to availability for work indicated that "availability" is an aspect of unemployment under FUTA, the exemption for provisions relating to the active search for work confirms that involuntariness is an aspect as well.

Individuals who exercise the option to elect a temporary parental leave from their existing jobs are not "involuntarily" out of work. Hence, employees on parental leave fail to meet the third eligibility criteria as well. The proposed regulations establish that, since the employee will return to employment at the end of the leave, the employee will not actively be seeking new or other work during the leave period. See 64 Fed. Reg. 67975 ("The term 'leave' implies that the individual will return to the last employer after a designated period."). Finally, the comments to the proposed Model State Legislation underscore this fact by providing that BAA–UC recipients "cannot meet the systemic and sustained work search requirement" relating to the 1970 amendments to FUTA. 64 Fed. Reg. 67979.

II. The Proposed Regulations Impermissibly Undermine Congressional Intent Embodied in the Family and Medical Leave Act

The proposed regulations boldly acknowledge that BAA–UC is designed to "provide partial wage replacement to mothers and fathers on leave following the birth or adoption of a child." 64 Fed. Reg. 67972; see also, commentary on Model State Legislation, 64 Fed. Reg. 67978. As the Chamber established above, this objective is wholly incompatible with the purpose of unemployment compensation and the requirements of joblessness, availability, and involuntariness which are intended to prevent the diversion of UC funds to other governmental purposes. Moreover, this frank admission of intent to use UC funds to pay for parental leave demonstrates that the proposed regulation is a direct challenge to Congressional judgement and intent. Thus, in enacting the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et. seq. (FMLA), Congress considered whether family leave should be paid or

unpaid and expressly provided that, as regulated by the Federal government, the right to leave "because of the birth of a son or daughter" (29 U.S.C. § 2612(a)(1)(A)), should be unpaid. 29 U.S.C. § 2612(c)(d). Accordingly, the BAA–UC, which authorizes states to pay parents on parental leave out of unemployment compensation funds, is an impermissible attempt to make an end-run around the considered judgement and authority of Congress.

III. THE PROPOSED REGULATIONS UNDERMINE THE STABILITY OF THE UC SYSTEM AND JEOPARDIZE THE SECURITY OF THE UNEMPLOYED WHO RELY UPON THE UC SAFETY NET

The BAA–UC proposal also jeopardizes the stability of the UC system. In the last recession, more than 25 states depleted their UC reserves and had to borrow from the federal government. DOL's own statistics show that if another similar recession hits, states will need to borrow an additional $25 billion. In spite of this, DOL now advocates (through the proposed regulations) that states expand access to UC, a policy which is at cross-purposes with DOL's solvency objective and its goal of expanded access to legitimate UC claims.

By DOL standards, the trust funds of some 20 states are currently under-funded, and the combined funds of all states fail to satisfy DOL's solvency rating. UI Data Summary, Unemployment Insurance Service, U.S. Department of Labor, June 1999 (Data Summary). The proposed rule would exacerbate this serious problem by piggybacking parental leave benefits on a financially precarious UC system.

The potential costs of parental leave benefits are not inconsequential. Contrary to DOL's maximum estimated cost of $68 million for BAA–UC implementation, it cannot be assumed that only a few states will adopt the proposed regulation. All 50 states are invited to embrace these regulations providing paid parental leave from UC funds, and the possibility that all 50 states will adopt the proposed regulation must be considered in determining the potential negative financial impact on the UC system. On this premise, and given the average benefit per claimant of $200 per week (Data Summary, September 1999), a 12-week benefit pay out as contemplated by the Model State Legislation (64 Fed. Reg. 67977), experience rating and other factors costing 25 percent or some $600 per claim, and DOL's projection of 6 million potential new claimants each year, the drain on the nation-wide UC system could be $18 billion per year. This amounts to about 60% of the regular benefits paid to truly unemployed workers in 1999. Moreover, since states are free to establish the length of the benefit period under the proposed regulation, it seems likely that all or many would treat unemployed claimants and BAA–UC claimants the same and provide payments to both for 26 weeks. This could increase the cost of BAA–UC claims to $36 billion and consume 80% of current UC reserves. Moreover, this $36 billion is nearly twice the annual revenue flowing into the state UC trust funds. Under these circumstances, UC trust funds would be quickly drained unless substantial new taxes were imposed on business.

Without question, the magnitude of increased taxes required to satisfy both unemployment and parental leave claims, particularly in the context of a future recession with an increase of 200–300 percent in unemployed claimants, would place an unconscionable burden on all employers and, particularly, small businesses. Rather than further burdening employers with new payroll taxes, Federal and state governments should be easing taxes on business and encouraging the building of reserves for periods of economic hardship. Alternatively, in the absence of overbearing tax increases, payments to BAA–UC claimants are likely to dissipate UC funds beyond the minimum necessary to pay the claims of those unemployed but available for work—those for whom these benefits were created and intended. Both alternatives are unsatisfactory.

Finally, small business is likely to be disproportionately impacted by diversion of UC funds to those on parental leave, regardless of whether or to what extent new taxes are imposed. Since the proposed regulation deals only with the payment of UC funds to employees on BAA–UC leave, and not with the right to take leave in the first place, most employees are expected to establish their right to leave under the FMLA. The DOL clearly contemplated this as well in fashioning Model State Legislation based upon a leave period of 12 weeks. Compare 29 U.S.C. § 2612(a)(1) with 64 Fed. Reg. 67977. However, the FMLA only covers employees of businesses with 50 or more workers. 29 U.S.C. § 2611(4)(A)(i). For this reason, employees of small businesses are far less likely to secure parental leave; hence, the UC contributions of small employers applied to BAA–UC will be disproportionately diverted to employees of larger companies rather than evenly distributed without regard for employer size. This disparate impact in the application of UC funds under the BAA–

UC is blatantly unfair to small business and constitutes equitable grounds for withdrawing the proposed regulation.

CONCLUSION

It is hardly coincidental that in the 65 years since the unemployment compensation system was adopted, stringent requirements have developed to govern qualification for UC benefits. Strict limitations on the use of unemployment trust funds is necessary to counter political pressure to use these funds for other governmental purposes. Those limitations embodied in FUTA require claimants to satisfy the following criteria: (1)be without a job; (2) be able to and available for work; and (3) be involuntarily unemployed.

The BAA–UC satisfies none of these FUTA-required criteria. Thus, a claimant on parental leave (1) has a job guaranteed by law, contract, or through arrangement with the employer; (2) is on leave from the job, not out of a job and searching for other employment; and (3) is temporarily away from the job by choice, rather than by direction of the employer. Hence, it should be beyond dispute that paid parental leave does not qualify as unemployment within the meaning of FUTA and related laws and decisions.

Moreover, the BAA–UC oversteps permissible bounds by attempting to create paid leave for parents of newborns and newly adopted children in the face of Congress' determination under the Family and Medical Leave Act to limit parental leave to unpaid leave.

In addition, the BAA–UC proposal undermines the stability of the unemployment compensation system and jeopardizes the UC safety net for jobless workers by imposing potentially staggering new liabilities upon a fragile, under-funded unemployment compensation system.

Finally, the timing of the BAA–UC, and time frame for comments thereon, necessarily discouraged public responses at the state, local, and Congressional levels. The initial 45-day comment period from December 3, 1999 to January 18, 2000 fell within a Congressional adjournment, and the period was too short—particularly in view of the intervening holidays—to permit meaningful grassroots comment. The subsequent 15-day extension did not cure these defects. Hence, a further extension should be granted to allow hearings at several locations throughout the country in order to ensure that state and local officials, individual employees, and employers have an adequate opportunity to comment on the proposed regulation.

REQUEST FOR RELIEF

For all of the reasons discussed above, the proposed BAA–UC regulation is contrary to law, represents unsound public policy, and should be withdrawn. Due to the abbreviated comment period, the Chamber requests that hearings in several diverse locations be held to permit greater participation in the BAA–UC process at state and local levels, and the Chamber reserves the right to supplement these comments at a later date if additional relevant information comes to our attention.

Respectfully submitted,
U.S. CHAMBER OF COMMERCE

Chairperson JOHNSON. Thank you. Mr. Wheatley.

STATEMENT OF JACK F. WHEATLEY, DIRECTOR, MICHIGAN UNEMPLOYMENT AGENCY

Mr. WHEATLEY. Thank you, Madam Chairman and members of the committee. I'm Jack Wheatley. I'm Director of the Michigan Unemployment Agency.

We are the unemployment insurance people in Michigan. That is our one and only function. We administer the Michigan unemployment insurance system.

Let me say right up front that we oppose this rule. This is contrary to the fundamental concept of unemployment insurance as established by our legislature and the Congress in the Social Security Act. That is, to receive benefits, one must be connected to the labor

market, must be out of work through no fault of the employee's own, and able and available to work.

I should not be interpreted as opposing the idea of helping families. I think we're all for that. It's just it should not be funded from the unemployment insurance act. If it's something that should be adopted, it should be debated fully by the Congress and by state legislatures, but first by the Congress.

As mentioned before, Michigan has an interesting economy. Although we have diversified a great deal in Michigan, I'd like to brag that we have been, for three years straight, the number one recipient of the new business development award from Site Selection Magazine. We still have a large manufacturing component to our economy and still largely dependent, to some degree, on the automobile industry.

So turn-downs hit us harder in Michigan. That's been a fact of the past and we're not passed that yet. More about that later on.

Again, Michigan lawmakers and Congress designed and intended the unemployment insurance program to be funded by employers to protect men and women who are out of work through no fault of their own. By the very nature, as stated here before, participants in the Family Leave Act are choosing not to work. They are not involuntarily laid off.

The integrity of the trust fund must be protected and must be available when needed to pay benefits to men and women who are involuntarily laid off and already suffering the stress of being out of work.

This proposal, again, as good as they are, as laudable as this proposal and there's a lot of good ideas out there, I can enumerate others if you want, they are not worth putting our trust fund at risk when it's needed to serve men and women who are out of work.

Again, we've made excellent progress in diversifying our economy in Michigan, but during the '80s and '90s, we had to borrow, as noted before, over 2.6 billion from the Federal Government to pay benefits to men and women who were laid off and out of work because they chose—involuntarily.

Chairperson JOHNSON. Is that 2.6 million?

Mr. WHEATLEY. Billion. We had to pay that back—that is, our employers had to pay it back when we assessed a surcharge on them. As indicated before, fortunately, we've had good economic times, we've paid off that debt. Our trust fund now is 2.7 billion dollars, very healthy, and we want to keep it that way so that we can serve men and women who are laid off.

It's hard to really estimate what the cost of this program, if adopted, and we have no intention of adopting it, would cost Michigan. Of the 130,000 new births in Michigan last year, 1999, if 25 percent of those new parents took advantage of the rule, it would cost Michigan employers an additional 190 million dollars, at least our trust fund, 190 million dollars. If 75 percent of those people, if they took advantage, that would be up to 570 million dollars.

This is considerably contrasted, the original estimates of DOL was two to 68 million for the whole country. I don't know what their new estimates are.

Speaking of our Federal partner, Department of Labor seems to be moving in a different direction, at least they're sending us in a

different direction. They have initiatives right now that urges states to increase the solvency of their trust fund, despite the fact that we're at an all time high, 2.7, they want us to increase it up to over four billion dollars.

They also want us to increase eligibility to cover part-time workers, they want to mandate that. They want to mandate that the trigger be lowered to trigger the benefits in excess of 26 weeks that are currently there.

These alone, without any Family Leave Act proposal, would seem to lead us to only one conclusion—we might have to increase taxes for our employers, and I don't think that's a good idea. I think they need the money to expand jobs, to pay higher wages and their benefits, and make their own decisions.

Again, the integrity of our trust fund is important. Under Michigan law, our employers, for the most part, are experience rated. That is, they can control the cost of their UI taxes, to an extent, by minimizing their layoffs. A proposal like this would impact and decrease their ability to handle their own taxes.

Let me close on a personal note. My family experience or history in Michigan is probably similar to many. My father was a UAW worker for 30 years at General Motors Corporation. My brother and I were attorneys for GM for a number of years.

But we do remember how important UI benefits were to our family during these economic turn-downs in the auto industry in the '50s and '60s. Again, this trust fund and the integrity of this trust fund to pay benefits to people who are out of work through no fault of their own and not because they choose not to work is too important an issue to be decided by this rule without being debated by this Congress.

I see it as a serious breach of faith between our employers or the commitment we have made to our employers and the working men in the State of Michigan.

Thank you.

[The prepared statement follows:]

Statement of Jack F. Wheatley, Director, Michigan Unemployment Agency

Madame Chair and Members of the Subcommittee on Human Resources, I am Jack F. Wheatley, Director of the Michigan Unemployment Agency and a member of the Board of Directors for the Interstate Conference on Employment Security Agencies. Thank you for inviting me to testify today on behalf of the Michigan Unemployment Agency concerning the proposed regulations involving the Birth and Adoption Unemployment Compensation. I would like to commend the Chair for both the important hearing that occurred last week on the proposals to improve the administration of the national Employment Security system as well as the hearing today on the proposed regulatory action initiated by the U.S. Department of Labor.

The Unemployment Insurance program has been a critical program for the State of Michigan and we have a keen interest in assuring that it continues to provide adequate wage replacement whenever individuals become unemployed through no fault of their own. Michigan has relied on the Unemployment Insurance system to stabilize our economy through the horrific recessions in the late 50's and during the back-to-back recessions of the mid–70's and early 80's. As some of you may remember, between the years 1980 and 1983, Michigan's unemployment trust fund was required to borrow $2.6 billion when unemployment rates hit 17%. During that time, hundreds of thousands of Michigan residents collected benefits that carried them through the difficult times that Michigan experienced.

The good news is that because of diversification and sustained economic recovery, the economy is thriving, workers are reemployed, Michigan employers have fully repaid all outstanding loans and have accumulated a $2.7 billion positive reserve to guard against future recessions. Unfortunately, now comes some bad news, which

in some ways could threaten the reserves that we've been able to build. Worse, the proposal that you're holding hearings on today, in my opinion, potentially will totally undermine the integrity of the program that has served Michigan so well during periods of prolonged economic downturn.

It is important to indicate at the onset, that my comments should not be perceived as opposition to the concept, or the policy debate, of providing a means for individuals to address the needs of their families. No doubt we have all experienced situations in which, for the good of the family, it is necessary to put work aside and take some time off. I'm not questioning the importance of doing that. Rather, as the administrator of Michigan's Unemployment Insurance system, I have significant concerns about the impact of the proposed reinterpretation of federal eligibility criteria on the integrity of the federal/state Unemployment Insurance program.

My first concern is that the proposed program, while voluntary in nature, is a serious departure from the intended purpose of the Unemployment Insurance program. Over the history of the Unemployment Insurance program, employers have been consistently told that the taxes that are collected both from the federal unemployment taxes and the state unemployment taxes will be used solely for purposes associated with paying benefits to individuals who are unemployed through no fault of their own. Since the late 1970's, however, this employer-funded program, has not lived up to the promises made.

For example, a temporary 0.2% federal tax used to repay the costs of a federal benefit program has remained in effect even though the loan-which, was the reason for the tax-has been fully repaid. In spite of the surpluses that were being generated from the Federal Unemployment Tax Act (FUTA) revenues, states are not receiving the administrative grants that are needed to support the administrative costs of the UI program. Obviously, because there are sufficient tax revenues available, the problem is not a lack of resources. Rather, the problem is that the Administration does not request sufficient administrative funds to operate the system. This contributes to both the perception, and reality, that FUTA taxes are being used for other purposes.

Speaking of our federal partner, the U.S. Department of Labor, it seems that they are pulling states in opposite directions on this issue. On one hand, they want states to increase the size of our Trust Funds even though the reserves are at record levels. On the other hand, the Department want states to increase eligibility levels, not only for good deeds such as this, but to mandate that states pay benefits to part-time workers who are not available for full-time work, again something that is illegal under Michigan law. The U.S. Department of Labor also wants to lower the trigger levels for Extended Benefits. These proposals alone, not including the Family Leave proposal, would have only one result. That is, increased taxes for Michigan employers who would, I am sure, rather have the money to expand their businesses, hire more workers, pay higher wages, than paying taxes into a Trust Fund that is already at record levels.

Employers are encouraged to maintain solvent state trust funds to guard against future downturns. Now comes a proposed use of state trust funds for purposes unrelated to the original intent of the program.

You and I are stewards for the federal/state program. How do we face employers and suggest that an experimental program will be initiated to address family leave situations and that individuals will not have to be able and available to qualify for these special benefits? How does that change really relate to the insurance protection of a program whose sole purpose is to provide an income bridge for someone who involuntarily becomes unemployed? While many people may feel that it is a laudable goal to provide for parental leave, how does providing Birth and Adoption benefits become a responsibility of the Unemployment Insurance system? If the goal is to provide a social benefit to parents and their children, where will it end? Isn't it just as appropriate to provide benefits during leave time to care for a sick child, spouse or parent? That certainly strengthens the family. What about providing parental leave during the summer months, when children might be alone while they are on summer break? Isn't that also an important time to be with children and to strengthen family ties? These are all great ideas and the existence of the proposed wage replacement would certainly make it possible for more parents to be with their children and relatives. Even though this experimental program is voluntary, I believe the proposed changes seriously undermine the integrity of the Unemployment Insurance program.

As you know, the rationale for the federal/state Unemployment Insurance program as enacted by the Social Security Act of 1935 was to alleviate the financial hardships of unemployment by providing temporary wage replacement of lost wages. Benefit entitlement was established only for those who were involuntarily unemployed and genuinely attached to the labor market.

As proposed, this experimental program ignores the existing "able and available" requirements of the system and weakens its ability to effectively determine a claimant's attachment to the labor force while benefits are being paid. Although the Department acknowledges that there have been some situations in the past when it interpreted exceptions to the "able and available" requirement, this is the first instance where the Department proposes to ignore (reinterpret) this requirement and allow a person who chooses to be unemployed to receive unemployment benefits.

Consequently, the suggestion that the existing state balances be used in family leave situations abandons the fundamental concept that an individual must be attached to the labor market as a condition of receiving benefits. Such a proposal also brings into question why states should accumulate additional reserves if those balances are simply seen as a "cash cow" to be used for unrelated purposes.

This voluntary program would also present a unique problem for Michigan employers who strongly support our system of experience rating. In the unlikely event that the Michigan legislature was to endorse the proposed program, employers would lose the ability to control their costs (either through direct or socialized benefit charges). However, the potential costs on the state unemployment trust funds could be dramatic. For example, in 1998, 133,649 babies were born in Michigan. If 25% of the parents avail themselves of these benefits, the costs would exceed $190 million per year (22% of our benefit expenditures last year). Those costs would skyrocket to $572 million per year if 75% used these benefits (68% of Michigan's 1999 payouts) and, $763 million per year (or, over 90% of our total payouts) if all parents used these benefits. (SEE ATTACHED CHART BELOW)

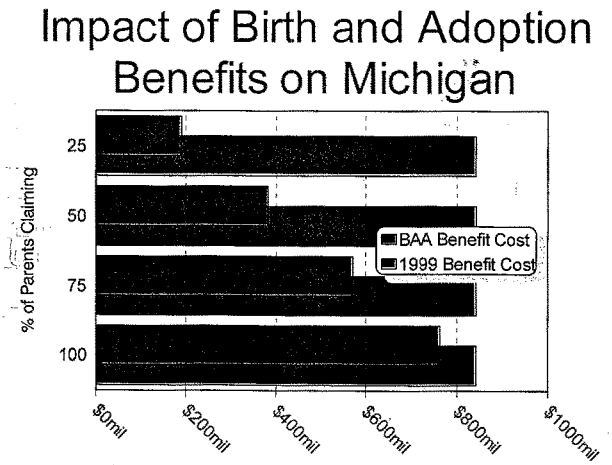
The concepts inherent in the Unemployment Insurance system have survived for over sixty years—throughout periods of prolonged economic downturns, through periods of insolvency, and recently through periods of prolonged economic recovery and expansion. The proposal if fairly analyzed is patently unfair to employers and the working men and women of this nation. I believe that these proposed regulations will serve only to vitiate the system.

Clearly, the Unemployment Insurance system has one of the best, proven infrastructures to deliver benefits. However, I would suggest that the service delivery system is a completely different issue from the revenue source and I want to take this opportunity to reiterate that Michigan and I oppose using Unemployment Insurance funds to finance these benefits.

As this committee moves forward in your analysis and discussion of the issues relating to the Unemployment Insurance program, I would ask you to keep several points in mind. First, relating to your meeting last week, Michigan supports reform efforts as long as the changes will sustain the system throughout the full economic cycle. Second, as it relates to the Birth and Adoption benefits, please do not expand the scope of entitlement to include individuals who are not available and able to work. We must ensure that the integrity of this important self-financed program continues and is available to the involuntarily unemployed during the good times and the bad. Since the Birth and Adoption benefits would rely on existing state trust fund resources needed for future downturns, if the reserves are used now to expand the scope of the benefits, the basic concept of forward funding for the Unemployment Insurance program is compromised.

If you choose to assist the parents of newborns and those who choose to adopt, then I would strongly ask this committee to identify an alternate source of funding.

I would be happy to answer any questions that you might have. Again, I thank you for the opportunity to share my views with you on this important matter.



Chairperson JOHNSON. I thank the panel for your testimony and we'll have a little chance now for questions. Mr. Wheatley, did I understand you to say that the Department of Labor is telling you that your trust fund balance isn't high enough?

Have they sent out a letter to the states in general urging them to increase their trust fund balances?

Mr. WHEATLEY. These are a number of initiatives that they have discussed with us. I don't recall if I saw it in writing, but we have discussed it on a number of occasions.

Chairperson JOHNSON. But in the last few months?

Mr. WHEATLEY. Yes.

Chairperson JOHNSON. So in the last few months, they're expressing concern that the 2.3 billion in your trust fund—

Mr. WHEATLEY. It's 2.7 billion.

Chairperson JOHNSON. The 2.7 billion in your trust fund now is not enough and they want it up over four billion.

Mr. WHEATLEY. Yes.

Chairperson JOHNSON. That is our information, too, that they have been pressing the states to improve their positions. Now, it is right, you should improve your position when the economy is good, because when the economy is not, the money is going to stream out and you're not going to have it coming in.

But that's very interesting to me, because it goes to the heart of the sort of contradictory policy initiatives that are coming out of the Department of Labor.

Also, I thought the ease with which you laid out the basis of your estimates was really remarkable. I mean, it's a no-brainer. Anybody can find out how many births there are and they can accommodate those numbers for the number of working women and so on and so forth.

And as you say, if only 25 percent, is just to me very unlikely that of the 130,000 births, 25 percent aren't working women. I

mean, that would be out of sync with all of the other things we know about women in the workforce.

Mr. WHEATLEY. Madam Chairman, as Congressman McCrery said, he doesn't know either what the estimate would do, but if you subsidize something, you're sure going to get more of it.

Chairperson JOHNSON. I will get the backup information from the Department of Labor as to their estimates. I forgot to ask the Deputy Secretary for that, but I will definitely do that, because I think the fact that you can so easily, off the back of an envelope, say here is almost 200 million.

Mr. Shimkus, where does—when you talk to your state department about this, now, Massachusetts is a totally Democrat state, I could never get elected there.

Mr. SHIMKUS. Except for our governor.

Chairperson JOHNSON. There is no reason why your department of labor wouldn't be enthusiastic about this proposal and there's no reason why they wouldn't want to give you an honest estimate, sine they're going to be able to get whatever they want through the legislature.

So how much did you talk to them about their estimate of 200 million? Which is way over. Remember, our national department says 68 million for five or six states.

Mr. SHIMKUS. It came out of testimony that Jack King, the Director of the Division of Employment and Training, gave last spring relative to Senate Bill 61, which is the legislative vehicle in Massachusetts that would move this experiment forward.

And as I understand from the testimony, and I did talk with Jack, as well, they took the numbers that were created for Vermont and adjusted for differences in the size of the labor force and the weekly UI checks, Vermont versus Massachusetts, between those legislative proposals and came up with a figure of actually 224 million annually.

They took the National Employment Law Project's estimate for Massachusetts, which is expressed by that organization in a cost per employee per week figure, they annualized that and it's 197 million. The DET's own estimate is 208.

So you're looking at between 197 and 224, DET says 200.

Chairperson JOHNSON. Thank you. If you would send a copy of that estimate to us, that is certainly quite detailed and we'll see if the Department of Labor's estimates were as detailed.

On this subject, Mr. Oxfeld.

Ms. OXFELD. Yes. Madam Chairman, I would like to introduce, for the record, a letter from two members of the Maryland House of Delegates, a bipartisan letter, and I'll just read you a line from it. "The Maryland unemployment insurance office is opposing the legislation as incompatible with the unemployment insurance system and estimates the financial impact on the unemployment insurance trust fund to be 68 million dollars annually."

Another state, as you pointed out, with a Democrat administration. Thank you.

[The information follows:]

March 3, 2000

The Honorable Nancy L. Johnson, Chairman
Subcommittee on Human Resources
Committee on Ways & Means
Room B–317, Rayburn Building
U.S. House of Representatives
Washington, D.C. 20515

Re: Birth and Adoption Unemployment Compensation Regulations (64 Fed. Reg. 59918, Dec. 3, 1999)

Dear Chairman Johnson:

As members of the Maryland House Economic Matters Committee and having jurisdiction for unemployment insurance issues, we are aware from national media reports that the State of Maryland has been cited as one of four states (Maryland, Massachusetts, Vermont and Washington) that has expressed interest in the BAA–UC experimental program. We write to set the record straight regarding Maryland's interest in the proposal being promulgated by the U.S. Department of Labor.

House Bill 1124, *Unemployment Insurance-Eligibility for Benefits-Birth or Adoption of Child,* was introduced during the 1999 Session of the Maryland General Assembly. House Bill 1124 provided 12 weeks of unemployment compensation for individuals who leave work immediately following the birth or adoption of their child, if they are the primary care giver and are not otherwise entitled to wages or salary from their employer. Maryland's Unemployment Insurance Office opposed the legislation because: (1) it would place Maryland out of conformity with federal law under the "able and available for work" requirement; and (2) it would negatively impact the Unemployment Insurance Trust fund balance. Allowing an entirely new category of individuals to file for and receive unemployment insurance benefits would deplete Unemployment Insurance Trust Fund revenues and trigger an increase in the surtax. The legislation was promptly defeated in the House Economic Matters Committee. This was the extent of Maryland's involvement in the issue at the time DOL issued the BAA–UI proposal.

Identical legislation has been reintroduced during the 2000 Session of the Maryland General Assembly (HB 1198 and SB 167). HB 1198 is scheduled for public hearing in the House Economic Matters Committee on March 9, 2000. Interestingly, neither bill reflects the content of the model legislation proposed by DOL. Again, the Maryland Unemployment Insurance Office is opposing the legislation as incompatible with the unemployment insurance system, and estimates the financial impact on the Unemployment Insurance Trust Fund to be $68 million annually. If enacted, this legislation would trigger a .4% increase in the unemployment insurance surtax in Maryland, costing *all* Maryland employers an increased unemployment insurance tax liability of $34 *per employee*.

Contrary to national media reports, there is little sentiment in Maryland to enact legislation that increases the tax liability of businesses by allowing birth and adoption leave to be financed through the unemployment insurance system. We hope this clarifies for the record Maryland's limited interest in this issue.

Sincerely,

DELEGATE VAN T. MITCHELL
[D–Charles Co.]

DELEGATE RICHARD LA VAY
[R–Montgomery Co.]

Chairperson JOHNSON. Thank you. Mr. Emsellem, do you have any concerns about the fact that this is going to require—you know, the Family and Medical Leave Act explicitly excluded employers under a certain size because the feeling was that they simply couldn't bear the economic burden.

This is actually going to require them to subsidize the costs of large employers, because it spreads it through the unemployment tax equally among all employers. So you're going to have big employers who are doing this as an incentive to attract people and

hold people, dumping their programs, and the cost being spread over all employers.

So the little guy with one employee or some employees, I guess they don't pay unemployment tax, but certainly with one employee, is going to carry sort of roughly the same burden as the big employer.

Mr. EMSELLEM. No, that's our concern, for a couple reasons. Number one, as I mentioned, if you take a look at the rates currently, you see that employers are paying on .57 percent of taxable wages at this point in time.

So what we're really talking about is the potential incremental increase above that rate. They're paying on those workers. And it is true, unfortunately, that because the unemployment system is now the only tax on the first X amount of wages, 7,000 dollars taxable wage base, small employers do pay proportionately more than large employers into the system.

Chairperson JOHNSON. Proportionately a lot more, because they've got—

Mr. EMSELLEM. I agree with that.

Chairperson JOHNSON.—a lot of 15 and 20,000 employees.

Mr. EMSELLEM. Proportionately more. But the point is what is the incremental increase over their current rate, and, again, their current rate, as of '99, is .57 percent, almost a half of one percent.

So the question is how much more over that are they going to pay as a direct result of this. There are lots of other factors that go into whether or not employers, what their rates are, what their tax rates are.

As I mentioned, there are a lot of tax cuts happening out there. So we have to say—we have to look at relative to when are we talking about a tax increase.

Chairperson JOHNSON. Certainly all of those things do count.

Mr. EMSELLEM. Right.

Chairperson JOHNSON. It is also true that in times of prosperity, you better be building up your balance. And I was interested that Michigan's balance, while it sounds terrific, isn't so terrific when you look at what it cost them during a recession. And one of the things that's very interesting, Mr. Emsellem, is that the Department of Labor isn't seeing these balances as terrific because they're out there talking to states to do better.

Mr. EMSELLEM. I agree that trust funds should be solvent. We advocate for increase in benefits and you have to have solvency.

Chairperson JOHNSON. But what do you make of the Department of Labor's getting out there and saying do better and then saying but also do this?

Mr. EMSELLEM. I think the Department of Labor has been very consistent. What they're saying is state by state and what this program allows is for state by state to make the determination whether you can afford this program. That's all they're saying. Some states are in a better position to do it than others. If I can just respond, because NELP was mentioned in an estimate and I would just like to correct that. We have not prepared any estimates for Massachusetts. We have not been in the business of preparing these estimates.

What we did use was we quoted a figure based on the 34 million estimate prepared by the Department of Labor of what that translated into per worker. My understanding of it in Massachusetts, what recently happened, which was not mentioned, was Massachusetts just froze its rate schedule, saving 200 billion dollars for employers, just this year, and the Administration asked for a 240 billion dollar tax cut, and that is the Administration supported by the Secretary King.

So again, it comes back to this issue of choices. What choices are we making during good economic times? Do we want to increase benefits or do we want to continue to cut taxes?

Chairperson JOHNSON. I do think this issue of choices is very important and I am pleased that Connecticut recognized that it had the choice of setting up a whole separate program and funding it.

Mr. EMSELLEM. That's another issue. That's—

Chairperson JOHNSON. And that's another choice. You see, you didn't need this initiative to be able to do that and we are going to ask for a CBO estimate, which is our estimator.

It is my belief, and you can shake your head if I'm wrong, people from the Labor Department, but it's my belief that the Labor Department estimate is their estimate and not OMB's estimate, is that correct? Yes, it is not an OMB estimate.

That makes a very big difference. But we will get the data behind their estimate. We will have our estimators estimate it, because you see, if we had done this legislatively, we would have had to know the cost and we would have had to pay for it. And one of the things that—one of the reasons I'm holding this hearing is because it is wrong, wrong, wrong in a free society not to be honest about benefit and cost.

And behind this screen you can say each state can choose. Well, this is a very—there is some truth in that, but it's also not responsible of the Federal Government in such a critical program not to say, which they could have said, in line with their old policy, you can do this, just do it with its own tax base, don't hook it onto the tax base of unemployment, because taxes are going to pay for it anyway.

I wanted to ask you that about small businesses and I see that isn't a problem for you.

Then the other thing that I think we have to be very concerned about is do you have any thoughts about what this does to the increasing inequities faced by stay at home moms? The increasingly bad way we treat them.

A stay at home mom, where they have made the sacrifice to live on one salary, and this person is earning, say, 25,000 dollars, that family gets nothing from the government for those three months when they are home with their child and it just seems to me wrong to continue to pursue policies that say because two of you work, you get to stay home with your child and we'll pay you for it, even though together you may earn 50, 60, 70, 80,000 dollars.

A teacher and a policeman in Connecticut earn more than 60,000 probably. So we're doing this without regard to income and we're doing it without regard to other mothers who are struggling to stay home with their children and need that money in order to be able to make good on that option.

So I think policy-makers, this is not your responsibility, but policy-makers who care about families and keeping families together do have to think about public policy not driving the wrong decisions.

Now, that much said, I think we really do have a job to do here to look at how workplace policy supports families being together, but I'm very concerned about both solvency and equity here.

Ms. Hostetler, this will be my last question and I'll yield to Mr. Cardin, but you're the only one that really went through some of the significant problems that this bill has created for employers and employees.

I thought your example of the law prohibiting counting time off on family leave in looking at attendance records and the idea of having to give out perfect attendance awards to someone who has been there every day and someone who hasn't is really—it's those kinds of little things that if the Department of Labor had brought a law, we could have talked about. If Connecticut had listened, they would have amended their law as well as the benefit program.

The intermittent issue is the one that I run into the most on the factory floors and employees don't like it and employers don't like it. But you mentioned that and you also mentioned the more than three days, the serious disease issue. Certainly Congress did intend that this be serious disease.

Are there other issues or would you care to give further examples of those?

Ms. HOSTETLER. I can tell you there are lots of examples and I can refer you to the testimony that has a number of examples and my Senate testimony has very real life examples, but the issue with the Department of Labor and what has made it so confusing for employers is that, as I said, the Congressional testimony, the Congressional intent, the statements on the Congressional record indicate that serious health conditions don't include minor ailments, and that's what the regulations initially said in 1995.

Chairperson JOHNSON. And did they change the regulations?

Ms. HOSTETLER. No. They issued opinion letters. So they issued a opinion letter following the regulations that not only said yes, minor ailments are not serious health conditions, but, in fact, it reinforced that to say they're not even serious health conditions if they last more than three days and if you see a doctor and if you get a prescription.

And then the very next year they issued an opinion letter saying sorry, that now it's exactly the opposite. That if it's a minor ailment—no matter how minor it is, in fact, if it meets the three-day plus requirement and you get a doctor's note and you get a prescription, even if you don't fill the prescription, it's a serious health condition—

Chairperson JOHNSON. Even if you don't fill the prescription, there is no differential diagnosis.

Ms. HOSTETLER. No.

Chairperson JOHNSON. And then you gave one example that I didn't quite understand. That somebody could take one day off a week forever. They would be limited by the three months.

Ms. HOSTETLER. That's my point. You can take a day a week and not accumulate 12 weeks in a year. So you can literally take—that's how much time—

Chairperson JOHNSON. If a doctor says that your serious illness needs a lower level of stress.

Ms. HOSTETLER. That's a major concern, but it doesn't matter what the diagnosis is. If the medical certification says they need to take time off as required, they may. There is no notice requirement, there is no further certification requirement, there is no further discussion about what the—

Chairperson JOHNSON. Is there any form—you know, workman's comp, you have a form. You can have a doctor evaluate.

Ms. HOSTETLER. No, there is not. You can't talk to the doctor. The employer is not even able to discuss with the physician, not ask any questions. That is prohibited by the regulations. The employer is also prohibited from using their own physician—if they've got a company doctor, so to speak, that they've used for worker's comp or some of these other statutory requirements, they're not allowed to use that provider in the case of family medical leave. That seems another odd twist that makes it more difficult for employers.

Chairperson JOHNSON. This is really quite a different system in every way than either our unemployment comp or our workman's comp system.

Ms. HOSTETLER. Completely.

Chairperson JOHNSON. This really makes my point. I know I was pretty tough on the guy from the Department of Labor, but to do this without looking at what has been happening and how we might need to refine or amend former law to provide paid leave when you don't even have the tools to determine whether the person was really sick, this is unheard of, unprecedented, and I am—I'm a moderate Republican.

I'm out there voting on everything that you can possibly vote on that I think we can possibly afford, so this is not a question. I've been a leader on children's and families issues. So I won't accept testimony that turns this into I like children and you don't or I care about women and you don't.

I'm not going to deal that game. What I am here about is we have to legislate honestly and deal with a challenge of the tensions between family and work, realistically and honestly, and I'll tell you, we're going to look into those opinion letters, too, and see why, when you started out with pretty decent regulations for a difficult law, we sunk into the mire of opinion letters that have now made this law almost functionally impossible to administer.

And you get out on the floor and you talk to the little guy—the big guys, they've got departments of human resources who tear their hair out about this, but these are big problems and, by gum, we have a national Department of Labor who ought to have had the guts to come up and say we want you to oversee this, we want you to work with us on it, because we see there are problems out there.

Now, Mr. Cardin.

Mr. CARDIN. Thank you, Madam Chair. Why don't you relax for a little bit, catch your breath.

Chairperson JOHNSON. He's my cooling off break.

Mr. CARDIN. Thank you. I appreciated a statement that you made earlier that this committee, the Human Resources Subcommittee of the Ways and Means Committee, does not have jurisdiction over the Family and Medical Leave Act. Perhaps if we had jurisdiction over it, we might want to talk about the issue you just raised, and that is what type of medical support should there be for the use of the Family and Medical Leave.

I believe you were responding, Ms. Hostetler, to the Family and Medical Leave Act and not to the use of unemployment insurance to deal with the birth of a child or the adoption of a child. That's what I thought this hearing would be focused on, and that is whether we should allow states the option to use their unemployment insurance system to deal with paying and providing some income for parents who take time off after the birth or adoption of a child, not for family and medical leave, which is a much broader matter.

Ms. HOSTETLER. May I respond?

Mr. CARDIN. Sure.

Ms. HOSTETLER. My concern is—you are absolutely right, but it is truly a backdoor attempt at expansion of the FMLA, at least that's how it comes across, and what we would like to make sure happens is an open dialogue about issues of the Family and Medical Leave Act.

Mr. CARDIN. And you oppose the expansion of the Family and Medical Leave Act?

Ms. HOSTETLER. Prior to any corrections of the current regulations—

Mr. CARDIN. So you oppose that. So you don't want to see that.

Ms. HOSTETLER. Prior to any—

Mr. CARDIN. Did you support the Family and Medical Leave Act?

Ms. HOSTETLER. I did.

Mr. CARDIN. Well, good. We're very glad to have that.

Ms. HOSTETLER. And there are lots of people who did support it that are now on the record as having problems with the current situation—

Mr. CARDIN. We're taking some of the testimony today and we're going to send it over to your state legislatures, particularly as they're considering changes in their tax codes as it relates to the solvency of their unemployment insurance funds.

Mr. Shimkus, I very much appreciate the chamber's strong commitment to a very solvent unemployment insurance fund within the various states of the nation. I hope that I'm hearing you correctly that you will support efforts to establish national standards on solvency that would prevent states from reducing their unemployment insurance taxes if they don't meet this federally mandated solvency test in order to ensure that states are not irresponsible. Because you don't trust the states, do you?

Mr. SHIMKUS. We are very interested in making sure that our state's unemployment insurance trust fund is solvent. And to be quite honest, I have been involved in this debate at the state level for years.

Mr. CARDIN. Are you going to answer my question?

Mr. SHIMKUS. I am. Bear with me for a moment.

Mr. CARDIN. All right.

Mr. SHIMKUS. We have been working on this for a number of years and I think part of the problem is how do you define what is truly solvent.

Mr. CARDIN. You don't trust the state to do it or you don't trust the Federal Government to do it?

Mr. SHIMKUS. The fact is we hear every year at the legislative hearings that it should be this amount or that amount and to be quite honest, it's only used, the numbers are only used when they benefit the advocates for trying to tap into these funds.

Mr. CARDIN. So the answer to my question is you would support a Federal standard in solvency that the states would have to meet before they could reduce their revenues going into their unemployment insurance fund.

Mr. SHIMKUS. I didn't say that. I said we're looking at it—

Mr. CARDIN. What are you saying?

Mr. SHIMKUS. I'm saying we're looking at it in Massachusetts and we're going to continue to look at it in Massachusetts.

Mr. CARDIN. I'm asking you a specific question. Would you support, would the chamber support a Federal standard in solvency on the unemployment insurance funds that the states would have to meet before they could reduce the revenues going into their unemployment insurance funds in order to maintain solvency?

Mr. SHIMKUS. Let me be clear. I do not know what the U.S. chamber's policy is on that particular issue. The North Central Massachusetts Chamber of Commerce, we're confined to looking at local issues that affect local employers. This is one of them.

Mr. CARDIN. So would you support it as a local chamber?

Mr. SHIMKUS. I would have to take a harder look at it. I haven't seen all of the evidence that would support one way or the other.

Mr. CARDIN. Well, you come from a state that you don't have a great deal of confidence in, it seems like, in doing the right thing, as the chamber sees it, in regards to unemployment insurance. Is it that you only—I don't understand the consistency of your position. You either support Federal requirements here or you don't, or are you just picking and choosing which ones happen to benefit you financially?

Mr. SHIMKUS. We are suggesting that our state ought to look at whether it has a solvent system and that you shouldn't create—

Mr. CARDIN. Should they be allowed to reduce the taxes before they meet a Federally mandated solvency standard?

Mr. SHIMKUS. You should not create a system in which the Federal Government sets forth some benefits that could have dramatically—

Mr. CARDIN. That's not the question I asked. The question I asked is should Massachusetts be able to reduce their taxes if they haven't met a Federally mandated—should we Federally mandate a solvency test that the state legislature could not reduce the taxes in Massachusetts on the employers until that test is met?

Mr. SHIMKUS. I personally do not believe so.

Mr. CARDIN. Because why? You don't trust the Federal Government or you don't trust the state government here?

Mr. SHIMKUS. It's not a matter of whether I trust the Federal or the state. It's that—

Mr. CARDIN. If the regulation allows the legislature, allows the legislature and the governor in Massachusetts to make the decision on these benefits, the Federal law currently allows great discretion with the General Assembly and the Governor of Massachusetts on imposing the taxes necessary for solvency.

On one hand, you do not want to let the people of Massachusetts make a decision on this benefit, but you want them to be able to reduce solvency, and your point is you want to protect the solvency of the trust fund.

I'm somewhat—

Mr. SHIMKUS. I think as Senator Gregg said earlier, the Federal Government is ultimately the insurer of last resort. So clearly the Federal Government ought to be concerned and what I'm concerned about here is that we can't get to what the exact number is and if we had gone through a regular course with Congressional hearings and—

Mr. CARDIN. Regular course for what, for the costs of it? I admit there's no—

Mr. SHIMKUS. No, no. I'm saying if we hadn't gone through the rule-making process, if we were going through, as Madam Chairperson had suggested, a normal operating procedure to identify funds to do the types of things that folks are looking to do through Congressional authorization, that would have made much more sense, and perhaps then we could talk about—

Mr. CARDIN. Were you present when we went through the process in which training was made acceptable for someone receiving unemployment insurance? That was the most dramatic change on eligibility to receive unemployment insurance.

The Congress didn't pass any laws to allow for training.

Mr. SHIMKUS. But in this case, in—

Mr. CARDIN. It did after the fact, but not before. It used the national experiment first through the Department's findings and when it was so successful, then we mandated it for every state. But we started first by giving the ability of the states to move in this direction.

That's the whole concept of Federalism, which I happened to have thought the chamber supported the concept of Federalism, but it seems like you have selective Federalism. You support Federalism when it helps you, but not when it provides help to the workers, and that's what really troubles me about your testimony today.

I don't mind you being inconsistent, but at least acknowledge that you're inconsistent on this issue.

Mr. SHIMKUS. We don't believe that the implementation of this experiment will help working families.

Mr. CARDIN. I appreciate your candor on that. Let me move on to a couple other areas, if I might here.

I know, Mr. Oxfeld, you wanted to get in here. I just want to point out that there is a lot of confusion on the dollars here and we're going to try to get as much objective information as we possibly can.

But I'm not so sure you're helping the process by using, in your testimony, 18 billion dollars as the estimated cost of the expenditures of the adoption of this regulation. If I understand it, that

would assume that every state would enact this new program, which is not going to happen.

All employed workers would be eligible and that's not going to happen, because some don't have sufficient earnings. All potential eligibles will take leave. That's very unlikely. All leave takers would file. That's not the experience under the current program, where 70 to 80 percent of the eligibles file. Each claimant will collect a full 12 weeks. That ignores the fact that the unemployment benefits are less than the salary and many people are going to go back to work within the 12 weeks.

So I guess my point is I'm not sure we're moving this process forward by trying to exaggerate the impact that this has on the system. We all acknowledge there is a problem out there and yes, this will have an impact on the unemployment insurance funds for those states who enact state law to deal with it.

But then we'll have some real experience when those states do that and then we can really see the experience of whether Mr. McCrery's concerns about employers all of a sudden dropping their paid leave.

My experience among employer-employee groups is that doesn't happen. There is such a thing as collective bargaining in many communities and that's just not going to readily happen overnight.

So I don't think that's particularly useful to our trying to put together a testimony on how we should respond to this issue. I personally believe it is very helpful to have some experiences at the state level to see what is happening and I look forward to working with some of you to try to deal with solvency statutes.

I hadn't thought about it really before today's hearing, but I think listening to this panel, you really have whet my appetite to the need for Federal solvency standards.

I didn't realize there was such a concern out there that the states were going to do irresponsible actions.

Mr. Emsellem's point about the tax cuts that have occurred throughout this nation for employers because our economy seems to be doing so well really beckons the point that many of you mentioned, and that is that the economy is going to turn and we're going to go through recessions and these trust funds are going to be very strapped at different times, and maybe the states are doing the wrong thing right now as it relates to the reduction of revenues going into the unemployment insurance trust funds.

So let's at least work in a somewhat more consistent basis. I always felt that giving the states more flexibility in managing their system was a good thing. It's strange, I came to Congress after 20 years in the state legislature, I came here biased towards allowing states more flexibility, and I have found some friends on the other side of the aisle that helped in dealing with some of these issues.

I am somewhat amazed now, it's tough to find friends on the other side of the aisle who want to give the states more flexibility. They only want to do it, it seems like, when it is in the interest of some self interest, more so than in the general benefit of using the states to develop a more realistic way to deal with the problems that we have in our community.

I thank you, Madam Chair, for your patience.

Chairperson JOHNSON. Mr. Oxfeld, did you want to get in there?

Mr. OXFELD. Well, Mr. Cardin made some very eloquent points, but I don't want the record for the hearing to close without being able to make the observation that the issue is not whether it's desirable to have the national government design a one-size-fits-all solvency standard that has to work the same for Maryland as for Michigan as for Alaska as for Delaware, which is my home state, as for Nevada or Connecticut. That's not the issue.

The issue is that this will indeed result in additional spending. This is wholly outside the scope of what the unemployment insurance system is designed to do and it's not doing such a hot job of doing what it's designed to do and it's really incumbent on this committee to be responsive. Let's make UI work and do what it's supposed to do before we think about trying to give it a function that it is not equipped to handle.

The analogy we always draw is you can use a screwdriver as a hammer, but it makes a really lousy hammer and it's likely to ruin it as a screwdriver. And if we try to make the UI system, which is finely attuned to trying to help people who lose their jobs, while they're looking for new work, get back into work, and if we try to make it into a system that it isn't to help people who are unavailable for work, who have taken themselves out of the workforce, and who will undoubtedly be counted as unemployed for triggering benefit extensions later on, that is a mistake and it's going to be harmful to the interest of the workers and the employers for the whom the UI system is designed.

Thank you.

Chairperson JOHNSON. I find the solvency issue a little different here, since the benefits are mandated, states have to pay them. If they don't have enough money in their trust fund, they are compelled to borrow.

So a solvency standard, a state having a realistic solvency standard, serves them because they don't have to borrow, and I thought it was real interesting that Judd Gregg, a good conservative Republican, raised taxes rather than borrowing.

Mr. OXFELD. He didn't sign it, though.

Chairperson JOHNSON. Oh, is that right? That's interesting. Well, it goes to show how painful these decisions are.

I do want to just clarify one point that has been going on and off during the hearing and I should have clarified it very much earlier.

Correct me, Mr. Emsellem, if you don't agree with this. But earlier on, the Commission and others have given examples of voluntary unemployment that the unemployment system now covers and actually the only exception is really training.

If you're taking care—if you have to leave because of illness or taking care of an ill person, you still have to be available for a different shift job. In the instance of someone whose spouse moves, that you are unable to work, because you are physically removed from your job, I think that is a little different than just not wanting to go to work.

The other instance that comes to mind is jury duty, where the government is compelling you to take another responsibility on. If my recollection serves me—my recollection does not serve.

So training is the key instance in which we provide unemployment compensation.

Mr. EMSELLEM. Could I respond to that?

Chairperson JOHNSON. Yes, you can.

Mr. EMSELLEM. There are three levels that you have, there are three issues that have to be looked at. One, did you leave work—this is what people go through to qualify for unemployment—did you leave work for the right reasons, we've covered that. States, about a third of them cover family leave under various domestic circumstances for leaving work. That's allowed, no debate about it, no legal issue about it, they've been doing that since the creation of the unemployment program.

The second question is once you qualify for—

Chairperson JOHNSON. For what causes?

Mr. EMSELLEM. For a whole range of domestic circumstances, whether you left work because you couldn't deal with an emergency child care problem, whether you left work because you're taking care of a sick family member, all those things—

Chairperson JOHNSON. I am not aware of unemployment comp covering that.

Mr. EMSELLEM. Ma'am, that's allowed in one-third of the states. I can provide you a chart of that. That's the question of whether you left work for the right reason. Like I said in my testimony, what I find great about this, we're an unemployment advocate, it's great to be debating what the unemployment program is all about, because a lot of people walk around thinking that they don't qualify for benefits and don't come in and apply.

In fact, we know that almost about 45 percent of people who are significantly attached to the labor market never walk in and apply for benefits, and part of the reason is because they walk around with misperceptions about whether they qualify.

Chairperson JOHNSON. That is definitely a problem.

Mr. EMSELLEM. So that's a big issue.

So the next level is are you available for work once you—well, the next question is are you unemployed, quote-unquote. States have a ton of flexibility to decide what's unemployed. In fact, lots of workers get unemployment benefits who are still employed. In a lot of states, there's something called—in almost every state, there is something called partial unemployment benefits. You reduce your hours, receive benefits, and stay in your job. Or short-time compensation. You adjust your hours to avoid layoffs, but you are still employed.

The last question, which is what this legal issue is all about, is whether once you qualified and met those other tests, are you willing and able to accept another job.

Chairperson JOHNSON. Availability.

Mr. EMSELLEM. Availability. That's the only legal issue we're talking about since the beginning of time. So the question is can the states decide that. I'm sorry, I just want to—

Chairperson JOHNSON. Go ahead.

Mr. EMSELLEM. And you put your finger on it. Training. Training. States—workers are taking themselves out of the labor market to do something good to improve their labor force attachment.

States did that, 22 of them did it before Congress said everybody had to do it in 1996. Okay.

And they can turn down a job that's offered to them, even a better job, a more suitable job, a job that pays more than what they earned before, but if provided they're in training.

The other situation I think there is very comparable, it's not exactly the same thing, but what we're talking about is whether states have the authority to decide these things, not exactly do we fit the peg, is the recall situation. Eight states say if you are in recall status, you are expected to be called back to your job, you don't have to take a job that's offered to you. It makes sense.

Why send somebody out looking for work if there is a job there for them, and that's good for employers. And so that's the concept, not that we have found the exact situation that looks like family leave, what we're talking about. What we're saying is the states have the flexibility to decide this and they've been doing it for years.

Chairperson JOHNSON. I'd like to let Mr. Oxfeld get into this, because this concept of being available for work is so very fundamental for the issue of eligibility for benefits, and in general, I think, across the states, it is sort of a kingpin concept of the unemployment compensation system.

Mr. Oxfeld.

Mr. OXFELD. Madam Chairman, you are so correct. The availability is the key issue here. In the case of layoffs, if the employer calls the worker back to work and they don't come, they don't collect benefits. If the employer has full-time work available and they're collecting part-time unemployment benefits because they had to take a part-time job, they don't collect unemployment benefits.

When work is available, the worker has to be available for the work. Even for training, and I disagree with Mr. Cardin's assessment, because I don't believe that the state training laws—that the authority for that to be consistent with Federal UI law was necessarily recognized until Congress amended the FUTA to expressly recognize training as an allowable exception to availability.

But even in the case of training, you have to be available for the training. If you don't show up for the training, because you're not—because you have personal reasons for not being there or any other reason, you don't continue to collect.

Chairperson JOHNSON. And you don't necessarily get unemployment comp during the training.

Mr. EMSELLEM. Yes, you do.

Mr. OXFELD. There are—if you're in approved training—

Chairperson JOHNSON. If a state chooses, adjustment assistance.

Mr. OXFELD. In very narrow instances where that training is the only way this individual can get back into the workforce by statute, the states have to approve the training and it is a very, very, very narrow exception, and to argue that parental leave and all kinds of family medical leave are likened to people who are in training, people who are unavailable work, home for personal reasons, argue that's not—

Chairperson JOHNSON. In other words, it doesn't cover all training and—

Mr. OXFELD. No. It has to be approved training.

Mr. EMSELLEM. There is no special limitation on it. I disagree. You've got the Labor Department people here who can tell you for sure, they wrote the program letter.

It is state approved training, that's it. I am from New York, we do this all the time in New York. We even have an extra fund that provides income support when you go past the 26 weeks. It's just got to be state approved training. There are no extra limits on it, and that's incorrect. That's the sort of misinformation that doesn't help in this debate.

The debate is about what the states can do. They've done a whole lot, they can do this program.

Chairperson JOHNSON. I think one of the problems in this hearing has been this very narrow group of people in the larger unemployment comp system who are getting unemployment compensation, but fall into this category that varies from to state to state about the degree to which they must be available for work, but that is a very small sliver of the people on unemployment. Most of the people on unemployment get it and have to be available for work.

Mr. EMSELLEM. But that's the state's option. There are—and I'd like to know the sliver. In different places, the sliver is very different. In Massachusetts, there are lots of folks who are not, quote-unquote, involuntarily unemployed getting unemployment benefits.

Mr. OXFELD. In the case of BAAUC, you have to sliver away every single aspect of unemployment insurance in order to try to fit this square peg into the round hole of UI. You have to get rid of voluntary quit, you have to get rid of availability for work, you have to get rid of ability to work, you have to get rid of refusal of suitable work, you have to waive the work search test.

You're going to have a different duration of benefits for people on legitimate UI and virtually every aspect of the system that you can think of, you have to change it in order to try to accommodate people who are going to be home on leave. It's simply not unemployment insurance. It's paid leave.

Chairperson JOHNSON. Thank you.

Mr. CARDIN. Madam Chair, just for the record, let me just again point out, on training, 1961, the Department of Labor interpreted the Federal law to permit states to include training as being not disqualifying you from receiving unemployment, which counters the availability issue that Mr. Emsellem talked about.

It was nine years later when Congress acted in 1970. So taking Mr. Oxfeld's point, I assume that you believe that all the benefits paid over that nine years by the states was not allowed. It was. They received the benefits and it was exactly the same type of circumstance that Department of Labor is trying to use today on the birth of a child or adoption of a child, to allow states to move in this direction.

The Congress always has the right to act. We can act to either say no or to say yes or to mandate or to permit. What we did on training was to mandate to require states to allow training, approved training to be equal to availability to work.

And the last point I would mention is there is no pure system around here. We all try to say how pure the integrity—there is no pure system. We always try to make these programs work to the

real world, what's happening, and it's not—the world is changing. The workforce is changing.

We need to make sure that these programs that were adopted 65 years ago still are contemporary to today's workforce and that's why we want the Department of Labor to be able to have regulatory authority and interpretative authority.

Congress is a little bit cumbersome in order to change policy. It takes us a long time and there are people out there who need some relief.

So I just really wanted to point out that I think the process that's been used here is not unusual, it's been used in the past, and that it's not inconsistent with the way that we've used the unemployment insurance system in the past and that what we are suggestion by that regulation issued by the Department of Labor is to give discretion.

I think that point has been lost over and over again. It doesn't mandate one person get additional unemployment insurance benefit. There is no requirement in the regulation that would cost one dollar in the trust fund. It solely allows the states to make decisions as to availability to work as part of their unemployment system, those that are out because they had the birth of a child or adopted a child.

Thank you, Madam Chair.

Chairperson JOHNSON. Thank you, Mr. Cardin. I do clearly disagree with you very significantly on this issue and I think, in a sense, the proof is in the pudding. Look at the different opinions we've had on what this is going to cost. If this had gone through the legislative process, you would have had the Administration's OMB estimate of what it's going to cost and you would have had the Congressional estimate from our own Congressional Budget Office of what it's going to cost.

And cost does matter, because you need to think about whether allocating this money in one way or allocating it another way best suits the needs of families and of our society.

Consequently, not only do I think that the Administration far over-reached the tradition of administrative authority and of Presidential directives, but had they done this the right way, there is clearly enough experience on the books for us to have been able to improve this law and until you improve this law, you are never really going to be able to improve the benefits that we provide to families who are struggling with the tension between work and family.

When you have a law that works as badly as this one does, it's dead on arrival when you want to expand it. So I really regret the fact that the United States Department of Labor does not do oversight, does not come to the Congress.

Now, we work closely with the Department of Health and Human Services. They come to us all the time saying this isn't working quite the way we expected, this isn't happening, that isn't happening, help us fix it, and we come to the table with different opinions and we fix the law, because we look at the problem.

And what the Administration has done here has denied us that opportunity, opened up a problem for states that becomes primarily driven by elections and not by policy considerations.

It has come out with scandalously inaccurate estimates. I mean, there is just no way that your estimates have any bearing on the reality when you look at the birth rate and the number of working women in the workforce.

So I am very—I think the Labor Department deserves every bit of criticism a lot of us have been laying on them, publicly and privately, and I hope next time they will have the courage to bring ideas to the Congress and work with us to improve public policy and I would hope that they would, again, look more closely at issues like comp time and loosening up the law so that people can be able to go to the school play and not have to fake an illness so they can be covered under family medical leave.

We have a long way to go in letting mom and dad be there at critical time for their kids and helping stay at home moms bear the economic responsibility of not working when their kids are young, and that latter issue is every bit as important as anything we've talked about under the family medical leave, and it is being completely disregarded by public policy-makers.

It is only a matter of equity and we have to begin looking much more carefully at the equities involved not only through what we do, but their impact and the impact on a workforce where inequity is like special ed, where a special ed kid can hit the teacher and not be disciplined, and the other kids can't. What kind of classroom does that create? What kind of workplace does it create to have a law that says that you're out all the time, but you can get an honor for perfect attendance?

There is something amiss here. We should be talking about it, we should be looking at it. That particular part isn't under our jurisdiction, but the solvency of the unemployment compensation system is and we're going to go further on these estimates.

We're going to compare the work of the Department of Labor with some of the state departments that have really looked into it, because if they are as far as off as they appear to be or as they might be, then this is a matter of solvency and action would be necessary to protect the unemployment compensation system so it's there when people lose their jobs.

Thank you.

[Whereupon, at 1:57 p.m., the hearing was recessed, to reconvene at the call of the Chair.]

[Submissions for the record follow:]

Statement of the Associated General Contractors of America, Inc., Alexandria, VA

The Associated General Contractors of America, Inc. (AGC) is a national trade association of more than 33,000 firms, including over 7,300 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories and industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation and utilities installation for housing development.

AGC members employ millions of hourly craft workers, and professional, administrative and management personnel in every state and Puerto Rico. Likewise, they pay millions of dollars in taxes to fund state unemployment insurance trust funds.

AGC welcomes the opportunity to provide this statement on unemployment compensation and the Family and Medical Leave Act to the Subcommittee on Human Resources of the Committee on Ways and Means. AGC respectfully requests that this statement be made a part of the record of the Subcommittee's proceedings.

Following are AGC's comments on the details of the Department of Labor (DOL) Birth and Adoption Unemployment Compensation (BAA–UC) proposal to permit the use of unemployment insurance program funds to pay parents for time they take off from employment after the birth or adoption of a child.

Summary

AGC does not support the Department of Labor proposal to permit the states to use unemployment insurance benefit funds to provide partial wage replacement to parents on leave following the birth or adoption of a child. AGC maintains that:

- The proposal jeopardizes the financial solvency of the unemployment compensation insurance system and could lead to substantial increases in employer unemployment insurance taxes;
- Abandoning the "able and available" for work standard undermines the historic purpose of the unemployment compensation system;
- The unemployment compensation system is not the appropriate vehicle to fund paid family leave and the proposal to do so represents a fundamental philosophical change with no statutory or administrative support;
- The purposes and objectives of the unemployment insurance system should not be changed without congressional hearings and thorough cost analysis; and
- The Department's estimate of the costs of the proposal is not realistic and does not consider its impact on economically sensitive industries like construction.

Proposed Rule

The proposed rule would permit states to use unemployment insurance (UI) funds to provide partial wage replacement to parents on leave following the birth or adoption of a child. The rule does not impose any solvency requirements on states as a condition of adopting such a program, or even require that a financial analysis be performed. The proposal permits eligible employees to voluntarily terminate their employment with no intention of returning to work and still collect unemployment benefits. The model legislation included with the proposal imposes a twelve-week limit to these benefits but at the same time the Department notes that "States are free to determine this."

AGC urges the Subcommittee to prohibit the states from using UI funds to provide partial wage replacement to parents on leave following the birth or adoption of a child. AGC believes that the proposal jeopardizes the financial solvency of the unemployment compensation insurance system, could lead to substantial increases in employer UI taxes and is inconsistent with the historical objectives and application of the unemployment compensation program.

The primary basis for the proposal is apparently a 1996 study by the Commission on Family and Medical Leave contending that "lost pay was the most significant barrier to parents taking advantage of unpaid leave after the birth or adoption of a child." The objective of the proposal is to "promote a continued connection to the workforce in parents who receive such payments."

To address this situation and achieve this objective, the Department of Labor proposes to eliminate the "able and available" for work standard that would otherwise apply to new parents, permitting them to voluntarily quit their jobs and still be eligible for UI benefits. The "able and available" standard was derived from the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), and has been the threshold criteria for eligibility for UI benefits for 65 years.

AGC does not believe that existing data support such a fundamental change in the UI system, or that the UI system is the proper financial or administrative vehicle for providing paid family leave. In fact, the proposal undermines both the objective the Department seeks to achieve and the historic purpose of the system—to provide temporary financial support in an economic downturn to those who have not caused their own unemployment. Such a change should not be initiated with such a vague justification and objective.

AGC is also concerned that abandoning the availability test—to cover workers who, by their own admission, are not actually available—cannot be done for one class of workers but not for others. AGC is not aware of any basis in federal law for making an exception solely to benefit workers who take parental leave. The BAA–UC proposal therefore portends the extension of UI program benefits to a host of heretofore-ineligible individuals (e.g., those who are unavailable for reasons other than parental leave). Indeed, the proposal itself admits that it "may also serve as a basis for further expanding coverage to assist a broader group of employees to better balance work and family needs."

The proposal is an apparently indirect attempt to create a compensated component of the Family and Medical leave Act (FMLA). A virtually identical proposal was considered and rejected by both the House and Senate during legislative consid-

eration of the FMLA. The UI system and the FMLA serve different and incompatible purposes. UI protects workers who lose their jobs when their employer no longer has work for them. UI benefits are payable only to individuals who do not have a job and only while they seek new work. Benefits cease upon an offer of suitable employment. As the Department itself recognizes, the exceptions to this principle apply only to those involuntarily unemployed and experiencing short-term exigencies. The current exceptions preserve the requirement that individuals be "able and available" for work. The FMLA, on the other hand, provides said leave for workers who have a job but take time off for personal reasons. By definition, workers on leave are not unemployed and are not entitled to unemployment compensation.

The philosophical change represented by the Department of Labor proposal is contrary to the principles of the UI system and conflicts with the longstanding interpretation of the Department itself. As the Congressional Research Service (CRS) pointed out in its June 14, 1999, Memorandum on this subject, the Department has historically directed states to deny UI benefits to workers who are voluntarily unemployed or who are unwilling and unavailable for work. AGC does not believe that such a fundamental change, for a completely different objective, is justified. Likewise, AGC does not believe that either governmental interests or those of individuals who rely on the UI system are well served by a proposal based on vague statutory language described as not prohibiting an "experimental program." Again, as the CRS has pointed out, the legislative and administrative history of the FUTA and SSA directly contradict the Department's proffered authority for this proposal.

For more than 65 years, federal law has protected jobless workers, employers and the public by assuring that state unemployment trust funds can lawfully be used for the *sole purpose* of paying *unemployment* compensation. This principle is so deeply embedded in the federal-state unemployment insurance "partnership" that federal law prohibits the use of state trust funds even for the related purpose of financing the administrative cost of processing claims for unemployment benefits. The Department's proposed rulemaking will change the fundamental objective and nature of the UI program, the safety net for jobless workers, by allowing the expenditure of state unemployment trust funds for the entirely different and incompatible purpose of compensating employed workers who take parental leave. Elimination of this essential federal protection for the jobless is a stunning and irresponsible abandonment of a principle that serves as a cornerstone of the nation's social insurance system. It is both ill advised and contrary to the clear and unambiguous statutory language of the federal UI laws and the Family and Medical Leave Act (FMLA).

The change in the objectives and administration of the UI program proposed by the Department should not be initiated or implemented without specific legislative authorization. The unemployment system is neither intended nor financially or administratively equipped to deliver paid family leave to employed workers. Congressional hearings and cost analysis by the Congressional Budget Office and others are necessary before the UI program is jeopardized. The Department's proposal to perform a "comprehensive evaluation" only after four states have operated a BAA–UC program for three years puts the cart before the horse and is a totally inadequate response to the need for a thorough assessment of the financial, administrative and productivity costs of this proposal.

Poorly researched government initiatives can cause widespread confusion and unintended consequences. Secretary Herman's recent comments on OSHA's policy on telecommuting are equally appropriate with respect to the BAA–UC proposal. A "national dialogue" between labor, industry and other impacted groups is necessary to "examine the broad social and economic effects" before it goes forward. An important social decision should not be imposed or authorized by a regulatory agency simply on the basis of noble sentiments or objectives.

Costs of the Proposal

AGC does not believe that the class of employees included in the proposal is "small," or that the Department's estimated cost of zero to $68 million is realistic. In fact, the Department's proposal contains no real data either supporting the need for this policy change or documenting its impact.

According to the Department itself, at least 20 states lack adequate reserves to meet future UI benefit claims. In the last recession, more than 25 states depleted their UI reserves and had to borrow from the federal government. The Department's own statistics show that if another similar recession occurred, states would need to borrow an additional $25 billion. In spite of this, the Department now advocates that states expand access to UI, working at cross-purposes to the Department's solvency objective and its goal of expanded access to *legitimate* UI claims. BAA–UC and UI expansion proposals send a strong signal to states not to build up reserves,

because any state that is risk averse and seeks to take a conservative approach to building up its benefits trust account risks political pressure to "spend it" now.

Of particular concern is the fact that states are not receiving enough administrative funding to handle the present UI claims volume. Because of this chronic situation, states will need to direct their FUTA administrative funds to finance the administrative costs of new BAA–UC benefits. In this environment, AGC believes it is extremely unwise for the federal government to propose adding a new benefit to the UI system.

AGC believes that a fair and objective analysis is necessary to determine what it will cost if every state, or even a significant number of states, adopts a BAA–UC program. The cost of BAA–UC will be borne by employers through higher payroll taxes. If every state were to adopt the program proposed by the Department, the direct additional state UI payroll tax burden on employers would be at least $18 billion per year using conservative estimates. The calculation of direct cost is straightforward. The current weekly UI benefit amount is approximately $200. If a claimant were to collect 12 weeks of benefits (as recommended in the Department's model state legislation) the direct price is $2,400 per claim. Because of the effects of experience rating and other factors, the ultimate tax cost to an employer will be $3,000 per claim. The Department has stated that there are 6 million new parents (and therefore potential claimants) each year. If each one claims 12 weeks of benefits the tax cost will be $18 billion.

It is important to note that the figure of $18 billion is only for parental leave. This calculation doesn't take into account the additional costs of delivering paid leave to BAA–UC claimants through UI for 26 weeks like true UI claimants. Nor does it consider the costs of lost productivity or other impacts on employers who will have even more vacant positions and the same amount of work to perform.

In the model state legislation, the Department recommends that BAA–UC not be charged against an individual employer's UI account. In other words, the Department suggests that BAA–UC should be socialized across all employers, regardless of whether their employees are receiving BAA–UC. Given that some employers are currently paying the maximum amount of tax while others are not paying enough, the high occurrence of socialized costs in many states, and that many employers do not offer leave, AGC is very concerned that the Department's proposal exacerbates this problem by adding another non-chargeable benefit. Non-charging BAA leave would create serious inequities for the most vulnerable of employers, such as small business, which would be forced to subsidize this benefit for employers who do offer leave.

The Department's proposal will create a new type of benefit program for compensating parental leave. The UI system is experiencing significant problems handling its' existing obligations. Employers now pay nearly $30 billion a year in UI taxes when there is practically no unemployment. This figure will double or triple in future recessions. The current method of financing UI administration is a direct cause of these problems by providing inadequate funding for state UI and employment services agencies.

These impacts are especially important to AGC members. The unemployment rate in the construction industry has always run consistently higher than the rate in the economy as a whole. Likewise, construction is seasonal in many parts of the country and periods of unemployment are more frequent. The Bureau of Labor Statistics (BLS) reported that the construction unemployment rate in February 2000 was 7.5 percent, compared to a rate of 4.1 percent for the general economy. In addition, the BLS advises that the rate of job growth in construction experienced a significant slowdown in 1999 from 1998. Similar patterns may exist in other industries and demonstrate that considerably more data and information is needed before UI funds are compromised to achieve unrelated objectives. There is no reason to assume that the economy will continue to expand and remain stable in perpetuity. At a minimum, the Department should perform the analyses required by the Unfunded Mandates Reform Act of 1995 and Executive Order 12875, the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Act.

Simply asserting that the proposal is permissive and that states are free not to adopt it does not ameliorate the costs, risks and negative impacts of the Department's BAA–UC proposal. The fact is the Department of Labor is proposing a fundamental change in national policy with respect to employers' financial responsibility for the family lifestyle choices of employees through a regulatory amendment to an unrelated program. The Department has deliberately attempted to bypass the legislative process that has addressed these issues in detail, as evidenced by the current statutes on this subject and their legislative history.

Conclusion

AGC appreciates the opportunity to present its views on the Department's BAA–UC proposal. AGC does not believe that working people who voluntarily leave their jobs are entitled to unemployment insurance benefits or that the unemployment compensation insurance system is an appropriate vehicle to provide such individuals with paid family leave.

By trying to force this new benefit into the existing UI system, the Department would abandon the federal "able and available" requirement—the bedrock principle of UI. The BAA–UC proposal is contrary to the plain and unambiguous intent of UI law and policy. It will put the UI safety net at risk and dramatically increase employer costs. AGC strongly urges the Subcommittee to prohibit implementation of this unwise and unworkable proposal.

EMPLOYMENT POLICY FOUNDATION
WASHINGTON, DC 20005
March 16, 2000

A. L. Singleton
Chief of Staff, Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Singleton:

The Employment Policy Foundation (EPF) is submitting this letter and written statement for the record of the March 9 hearing before the U.S. House of Representatives Subcommittee on Human Resources on Unemployment Compensation and the FMLA.

EPF is a unique non-partisan research and education foundation whose purpose is to shape the direction and development of sound employment policy through timely, accurate, high quality economic analysis and commentary on U.S. employment policies affecting the competitive goals of American industry and the people it employs.

As the accompanying statement makes clear, policy makers and the public have not fully considered the ramifications of the UI funded family leave proposal. EPF finds its implementation would severely compromise the U.S. Unemployment Insurance (UI) system, costing up to $28.4 billion annually and pushing as many as 49 states and the District of Columbia below recommended solvency levels within three years.

Tax rates would have to rise by as much as eightfold in order to stem the depletion rate of states' UI trust funds. The direct tax burden falls on employers, but employees and consumers pay in the long run through lower wages, higher prices, or lower employment levels.

The UI system has already faced financial peril in the past. To subject this system to further costs would hamper the fund's ability to provide financial support during an economic downturn to its intended beneficiaries— the unemployed.

Sincerely yours,

EDWARD E. POTTER
President

Madame Chairman and Distinguished Members of the Committee:

Thank you for the opportunity to submit this written statement for the record on the critical issue of funding family leaves through the Unemployment Insurance (UI) system. The Employment Policy Foundation (EPF) is a unique non-partisan research and education foundation whose purpose is to shape the direction and development of sound employment policy through timely, accurate, high quality economic analysis and commentary on U.S. employment policies affecting the competitive goals of American industry and the people it employs.

Background and Summary

EPF's analysis of the proposal to fund family leaves for parents of newborn or newly-adopted children through the UI system shows that its implementation would severely compromise the solvency of the U.S. UI system. EPF estimates that, if implemented in all states and the District of Columbia (DC), such programs could cost

up to $28.4 billion annually—exceeding the $26 billion that employers paid into the system in 1998. Furthermore, the programs could push the UI trust funds of as many as 49 states and DC below recommended solvency levels within three years. Even under more modest assumptions based on European paid parental leave usage rates, costs could exceed $13 billion annually and could push 46 states and DC below solvency thresholds after three years.

Tax rates would have to rise by as much as 894 percent in order to stem the steady rate of depletion of the states' UI trust funds. Although the direct burden of payroll tax increases falls on employers, research shows that long-run costs are shifted to employees and consumers through lower wages, higher prices, or lower employment levels. As such, funding parental leaves through the UI system could ultimately undermine the remarkable current performance of the U.S. economy.

The UI system has already faced financial peril in the past. The 1980–82 recession forced 33 states to borrow over $20 billion from the federal government and over half the states borrowed funds during the 1990–91 recession. The federal account went bankrupt in 1977—resulting in a 0.2 percent surcharge to the federal unemployment tax that is still in effect today. Just last year, the Labor Department estimated that a recession similar to the one in the early 1980s would force 25 to 30 states to borrow $20–25 billion. To subject this system to further costs would hamper the fund's ability to provide financial support during an economic downturn to its intended beneficiaries—the unemployed.

Introduction

Since taking office in 1993, President Clinton has pushed to expand employment leave mandates. The first major bill signed by the President was the Family and Medical Leave Act (FMLA)—an initiative requiring that employers provide up to 12 weeks of unpaid leave rights, job protection, and continued health insurance benefits to workers for specified family and medical needs.

Now, the President has proposed extension of this mandate by making new parents eligible for compensation during leaves funded through the unemployment insurance (UI) system. On November 30, 1999, the President announced the release of new proposed federal regulations and model state legislation by the Department of Labor (DOL) that will allow and encourage States to extend UI eligibility to workers who take leave during the first year after the birth or adoption of a child.[1] These proposed regulations were in response to a Presidential directive issued in a May 24, 1999 executive memorandum.

Overview of the Unemployment Insurance System

Created by the Social Security Act of 1935 and implemented through the Federal Unemployment Tax Act, the UI system is a joint federal-state program administered by each state with federal oversight. It is funded entirely through employers' federal and state unemployment taxes. The system's objective is to alleviate financial hardship for the unemployed by providing them with partial wage replacement.

The system is self-financing: funds accumulated during expansions are spent during recessions. In the past, recessions have quickly depleted the fund. The 1980–82 recession forced 33 states to borrow over $20 billion from the federal government and over half the states borrowed funds during the 1990–91 recession. The federal account went bankrupt in 1977—resulting in a 0.2 percent surcharge to the federal unemployment tax, which is still in effect today. The DOL predicted in 1998 that a recession like the one of the early 1980s would force 25 to 30 states to borrow $20–25 billion.[2]

The proposed regulations would allow states to make UI payments to parents of newborn or newly adopted children without making them subject to current work tests. Efforts to fund family leaves through the UI system already have been initiated in several states including Connecticut, Maryland, Massachusetts, Vermont, and Washington. Although the proposed regulations specifically refer to leave for care of a newborn or newly adopted child, they also state that information collected on the parental leave programs "may also serve as a basis for further expanding coverage to assist a broader group of employees to better balance work and family needs."[3] This qualification leaves open the possibility of eventual extension of UI payments to all leave takers.

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[1] U.S. Department of Labor, "Birth and Adoption Unemployment Compensation; Proposed Rule, FEDERAL REGISTER, Vol. 64, No. 232, December 3, 1999.

[2] U.S. Department of Labor, *A Dialogue: Unemployment Insurance and Employment Service Programs,* 1998. Internet link: http://www.doleta.gov/dialogue/master.htm.

[3] Federal Register (1999), p. 67974.

Cost Consequences of the Proposal

To assess the costs associated with providing UI payments to individuals taking leave for care of a newborn or newly-adopted child, EPF developed a model examining the cost consequences of the enactment of funded parental leave legislation in all 50 states and DC.[4] Data used in the analysis were from the U.S. Department of Labor, the Census Bureau, the Bureau of Labor Statistics, and the State Department.

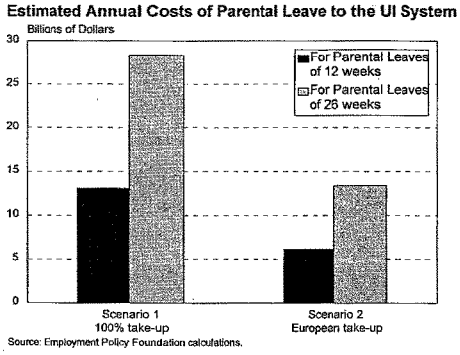
EPF assessed costs to the UI system under two scenarios:

Scenario One: All eligible mothers and fathers take leave.

Scenario Two: Parents take leave under European paid parental leave use rates.

Costs were estimated for each scenario under 12 and 26-week leave duration assumptions.[5] As Figure 1 shows, estimated annual cost under Scenario One (100% take-up) would be $13.1 billion for leaves of 12 weeks and $28.4 billion for leaves of 26 weeks. Scenario One reflects an upper bound for estimated costs to the UI system. At up to almost $30 billion annually, these paid leave costs would be one and one-half times the amount currently spent on UI nationwide.

Figure 1



Scenario Two may reflect more likely costs to the system. To approximate likely leave use rates, we calculated average take-up rates for men and women in five European countries with generous paid family leave policies.[6] As also shown in Figure 1, the likely costs of funded parental leave to the UI system under Scenario Two (European take-up), would be $6.2 billion annually for leaves of 12 weeks and $13.4 billion annually for leaves of 26 weeks. These costs would represent an increase over current UI expenditures of about 30 percent and 67 percent, respectively.

Solvency of the Unemployment Insurance Trust Funds

Although additional costs facing the UI system are a concern, the real issue is whether or not these costs would compromise the solvency of states' UI trust funds. If states have adequate reserves in their trust funds, an increase in UI costs would not necessarily mean an increase in firms' UI tax rates. If, however, the funds are inadequate, an increase in firms' tax rates will be required.

The DOL's proposed regulations leave determination of the solvency issue up to the states. In response to the question "Does this regulation impose any solvency requirements upon the states before they enact BAA–UC?" the document states:

No. The DOL expects that a State will not enact changes without assessing the effect on the solvency of its unemployment insurance fund. Each State has the re-

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[4] This is a refinement of a cost estimate first reported in "Paid Parental Leave: A $14 Billion to $128 Billion Entitlement," Economic Bytes, Employment Policy Foundation, September 10, 1999.

[5] The 12-week assumption is used because the DOL's model legislation refers to leaves of that length. Because unemployed individuals in most states are currently eligible for up to 26 weeks of UI payments, it can be assumed that paid leave could be provided on that basis. The actual length of leaves is not predetermined, as Appendix B of the DOL's proposed rule lets states determine leave duration. *Federal Register* (1999), p. 67978.

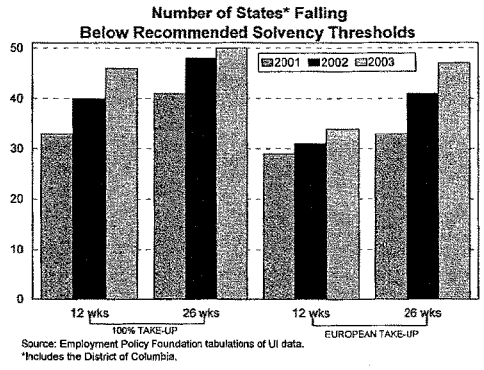
[6] The countries and their associated take-up rates were Austria (90% women, 1% men), Denmark (93%, 3%), Finland (99%, 2%), Germany (95%, 1%), and Sweden (90%, 78%). Take-up rates are as reported in Helen Wilkinson et al, *Time out: the costs and benefits of paid parental leave,* DEMOS, 1997, and are weighted by 1998 labor force figures from *The World Factbook 1999,* Central Intelligence Agency, 1999.

sponsibility to assess the cost to the State's unemployment fund whenever coverage, benefit expansions, or tax changes are considered within the State's UC program. Consequently, DOL expects prudent decision makers in a State to examine the State's solvency position and projected taxes and benefits payments under current law before deciding to enact BAA–UC legislation.[7]

This laissez-faire approach is ill advised for two reasons. First, as noted earlier, states have overestimated the financial solvency of their UI trust funds in the past. Second, 19 states and DC already have trust fund balances that fall below recommended solvency levels.[8] One such state is Maryland, where implementation of a BAA–UC program is already being discussed.

To assess the solvency of the UI trust funds, simulations were run using the annual cost estimates derived above. The amount of each state's weekly UI receipts was compared to each state's weekly UI costs (the sum of costs paid under the current system and estimated costs of funded parental leave programs) to compute the annual drain on the UI trust fund balance for each state.[9] A solvency threshold was computed for the next three years (2001–2003) and the solvency of each state's UI trust fund was assessed.

Figure 2



Under Scenario One (100% take-up), 45 states and DC would fall below recommended solvency thresholds after three years if 12 weeks of leave are offered; 49 states and DC would fall below thresholds after three years if 26 weeks of leave are offered. (See Figure 2.) Even under the more conservative Scenario Two (European take-up), 34 states and DC would fall below recommended solvency levels after three years if 12 weeks of leave are offered, and 46 states and DC would fall below safe levels after three years if 26 weeks of leave are offered.

Because five states (Connecticut, Maryland, Massachusetts, Vermont, and Washington) have expressed interest in implementing paid family leave, their solvency positions are of particular interest. As Appendix Tables 1 and 2 show, Maryland, Massachusetts, and Washington fall below recommended solvency levels within one year regardless of duration or expected take-up of offered leave. In fact, Maryland's UI trust fund already falls below recommended solvency levels and Massachusetts and Washington are barely above recommended solvency levels—even in the absence of a paid parental leave program. Connecticut falls below recommended solvency levels within three years under the 100 percent take-up assumption regardless of duration and within three years under the 26-week European take-up assumption. Expanding eligibility for UI payments to new parents in these states will put the UI system in financial peril if new costs are not replaced by an increase in businesses' payroll taxes.

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[7] *Federal Register* (1999), p. 67978.

[8] The solvency threshold used was the Average High Cost Multiple (ACHM), defined as the average of the three highest calendar benefit cost rates in the last 20 years. Benefit cost rates are benefits paid (including the state's share of extended benefits but excluding reimbursable benefits) as a percent of total wages in taxable employment. Although not a binding threshold, the DOL advises an ACHM> 1 as a good "rule of thumb" measure of trust fund solvency.

[9] Costs exceeded revenues in all states and DC under Scenario One's 26-week assumption, and in all but two states in Scenario One's 12-week assumption. Under Scenario Two, revenues exceeded costs in only one state under the 26-week assumption, and in four states under the 12-week assumption.

Unemployment Insurance Tax Rate Increases

In order to assess the consequences of UI funded parental leave, Figure 3 examines the increase in tax rates needed to stem the rate of state trust fund depletion.

Figure 3: Tax Rate Increases Needed to Stem Trust Fund Depletion

State	Scenario 1: 100% Take-up		Scenario 2: European Take-up	
	12 Weeks Leave	26 Weeks Leave	12 Weeks Leave	26 Weeks Leave
AL	94.84%	189.78%	51.69%	96.28%
AK	24.77%	52.77%	12.53%	26.25%
AZ	74.31%	187.75%	21.98%	74.37%
AR	62.01%	130.11%	31.58%	64.18%
CA	40.62%	97.13%	14.65%	40.86%
CO	98.13%	237.80%	36.46%	104.19%
CT	4.19%	43.72%	0%	6.28%
DE	37.28%	96.41%	11.53%	40.62%
DC	4.38%	28.49%	0%	5.50%
FL	142.45%	279.79%	80.25%	145.02%
GA	206.83%	419.95%	109.79%	209.69%
HI	57.87%	124.10%	29.11%	61.80%
ID	128.29%	228.66%	83.19%	130.94%
IL	60.79%	133.58%	27.79%	62.07%
IN	115.37%	245.38%	56.27%	117.34%
IA	113.82%	226.72%	64.26%	119.35%
KS	523.71%	893.73%	357.98%	534.66%
KY	53.53%	125.69%	20.97%	55.15%
LA	85.61%	189.64%	38.28%	87.11%
ME	0%	37.81%	0%	1.42%
MD	71.22%	163.23%	30.78%	75.60%
MA	36.96%	86.88%	14.85%	38.97%
MI	49.25%	107.15%	23.09%	50.47%
MN	82.35%	179.10%	39.63%	86.53%
MS	70.81%	161.53%	29.71%	72.49%
MO	61.98%	144.48%	25.54%	65.51%
MT	39.84%	98.10%	14.30%	42.76%
NE	279.35%	545.48%	160.45%	287.87%
NV	31.00%	86.55%	5.96%	32.28%
NH	183.51%	397.17%	87.96%	190.14%
NJ	57.36%	113.51%	31.75%	58.03%
NM	62.67%	142.75%	26.44%	64.24%
NY	62.48%	128.93%	32.03%	62.96%
NC	145.96%	285.22%	83.48%	149.84%
ND	108.47%	215.24%	61.54%	113.55%
OH	83.76%	178.47%	41.20%	86.26%
OK	338.08%	626.34%	205.37%	338.81%
OR	23.72%	62.18%	6.34%	24.52%
PA	41.50%	86.69%	20.90%	42.08%
RI	0%	28.82%	0%	0%
SC	106.97%	219.46%	55.65%	108.26%
SD	223.29%	472.71%	112.63%	232.95%
TN	87.50%	172.59%	49.66%	90.61%
TX	166.23%	327.63%	92.08%	166.96%
UT	202.23%	426.89%	99.21%	203.67%
VA	208.38%	428.37%	109.89%	214.97%
VT	36.75%	89.39%	13.73%	39.50%
WI	69.64%	138.12%	39.76%	73.38%
WY	92.91%	188.75%	49.76%	95.27%
U.S. AVERAGE	68.70%	145.43%	34.00%	70.24%

Source: EPF tabulations of UI data.

As Figure 3 shows, tax rates would have to rise on average by 34 to 145 percent in order to stem the steady rate of depletion of the UI trust funds. For some states, increases up to eightfold would be required.

Tax rates may have to increase even before a state's UI trust fund approaches insolvency. In most states, tax rates are based on the current level of state UI trust

funds. Additional taxes are imposed or current tax levels are raised when a state's trust fund drops below a specified level.[10]

Employees Bear the Burden of Unemployment Insurance Tax Increases

Payroll tax increases will put the direct burden of the costs of paid parental leave on employers. Although individuals and legislators alike often believe that such mandates are "free" or are provided "at the employer's expense," at least some share of employer costs are shifted to employees, either through lower wages, higher prices, or lower employment levels. Without raising UI rates, the unemployed face substantial jeopardy.

Most economists acknowledge that employer payroll taxes get at least partially shifted to employees. In a recent survey, 65 labor economists at 40 leading universities were asked their best estimate of the share of payroll taxes borne by employers in the long run. The median value was 20 percent; the mean value was 25.6 percent.[11] Other economists predict even greater cost shifting. A recent study by economist William Conerly estimates that ⅔ of a change in UI tax is borne by workers the short run, and ⅓ is borne by employers.[12] Conerly's estimates suggest that of the up to $28.4 billion annual burden that would immediately fall on employers, $19 billion would be passed on to workers in the short run through reduced pay raises, lost jobs, or lost benefits. That amounts to a $155 loss per worker annually. In the long run, however, he estimates that the burden of the tax almost fully shifts to workers.

Cost shifting is likely to occur because mandating benefits does not improve employee productivity. Because competition dictates that employee compensation track employee productivity, increasing benefits requires an offset, which often occurs through lower wages. If wages are not flexible downward, fewer jobs may be offered or increased labor costs may be passed on to consumers in the form of higher prices.[13]

Conclusions

To date, the UI system has served both employers and workers effectively—providing compensation to those who are both unemployed and able and available for work. The proposed regulations funding parental leaves through the UI system would fundamentally alter the nature of this system, while subjecting the system to costs of up to $28.4 billion annually—one and one-half times the current cost of the system. Aside from their direct cost, these outlays could also put the UI system and the financial protections for unemployed workers in jeopardy, pushing as many as 49 states' and DC's trust funds below recommended solvency levels. An increase in employers' tax rates of up to eightfold will be necessary, shifting long-run costs to workers and consumers.

The President's UI funded leave proposal could severely cripple the effectiveness of the UI system and the strength of the U.S. economy, which is currently experiencing its longest economic expansion in history. To enact costly government mandates at this time could put this remarkable economic performance at risk. Thank you for your consideration of our views.

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[10] For a full description of these threshold amounts, see *Highlights of State Unemployment Compensation Laws*, Strategic Services on Unemployment & Workers' Compensation, January 1999.

[11] Victor Fuchs, Alan Krueger, and James Poterba, "Economists' Views about Parameters, Values, and Policies: Survey Results in Labor and Public Economics," *Journal of Economic Literature*, Vol. 36 No. 3, September 1998.

[12] William Conerly, "Jobs, Not Unemployment: Reforming Unemployment Insurance," *Policy Insight*, No. 104, Cascade Policy Institute, January 1998.

[13] Lawrence H. Summers, "Some Simple Economics of Mandated Benefits," *American Economic Association Papers and Proceedings* 79 (May 1989): p. 177–183.

Appendix

Table 1: States with Trust Funds Below Recommended Solvency Levels

Under Scenario 1 (100 percent take-up rates)
(X= falls below recommended solvency levels)

State	Currently below recommended solvency levels	2 Weeks Leave			26 Weeks Leave		
		2001	2002	2003	2001	2002	2003
AL	X	X	X	X	X	X	X
AK		X	X	X	X	X	X
AZ				X		X	X
AR	X	X	X	X	X	X	X
CA	X	X	X	X	X	X	X
CO		X	X	X	X	X	X
CT				X	X	X	X
DE							X
DC	X	X	X	X	X	X	X
FL			X	X	X	X	X
GA				X		X	X
HI		X	X	X	X	X	X
ID		X	X	X	X	X	X
IL	X	X	X	X	X	X	X
IN			X	X	X	X	X
IA		X	X	X	X	X	X
KS		X	X	X	X	X	X
KY	X	X	X	X	X	X	X
LA				X		X	X
ME	X	X	X	X	X	X	X
MD	X	X	X	X	X	X	X
MA		X	X	X	X	X	X
MI	X	X	X	X	X	X	X
MN	X	X	X	X	X	X	X
MS						X	X
MO	X	X	X	X	X	X	X
MT			X	X	X	X	X
NE		X	X	X	X	X	X
NV		X	X	X	X	X	X
NH						X	X
NJ		X	X	X	X	X	X
NM							X
NY	X	X	X	X	X	X	X
NC		X	X	X	X	X	X
ND	X	X	X	X	X	X	X
OH	X	X	X	X	X	X	X
OK			X	X	X	X	X
OR				X		X	X
PA	X	X	X	X	X	X	X
RI	X	X	X	X	X	X	X
SC			X	X	X	X	X
SD	X	X	X	X	X	X	X
TN	X	X	X	X	X	X	X
TX	X	X	X	X	X	X	
UT			X	X	X	X	X
VT							
VA			X	X	X	X	X
WA		X	X	X	X	X	X
WV	X	X	X	X	X	X	X
WI		X	X	X	X	X	X
WY				X		X	X
U.S. TOTAL	20	33	40	46	41	48	50

Source: EPF tabulations of UI data.

Table 2: States with Trust Funds Below Recommended Solvency Levels

Under Scenario 2 (European take-up rates)
(X= falls below recommended solvency levels)

State	Currently below recommended solvency levels	12 Weeks Leave			26 Weeks Leave		
		2001	2002	2003	2001	2002	2003
AL	X	X	X	X	X	X	X
AK		X	X	X	X	X	X
AZ							X
AR	X	X	X	X	X	X	X
CA	X	X	X	X	X	X	X
CO		X	X	X	X	X	X
CT						X	X
DE.							
DC	X	X	X	X	X	X	X
FL				X		X	X
GA							X
HI			X	X	X	X	X
ID		X	X	X	X	X	X
IL	X	X	X	X	X	X	X
IN						X	X
IA			X	X	X	X	X
KS		X	X	X	X	X	X
KY	X	X	X	X	X	X	X
LA							X
ME	X	X		X	X	X	
MD	X	X	X	X	X	X	X
MA		X	X	X	X	X	X
MI	X	X	X	X	X	X	X
MN	X	X	X	X	X	X	X
MS.							
MO	X	X	X	X	X	X	X
MT						X	X
NE		X	X	X	X	X	X
NV				X	X	X	X
NH							X
NJ			X	X	X	X	X
NM.							
NY	X	X	X	X	X	X	X
NC		X	X	X	X	X	X
ND	X	X	X	X	X	X	X
OH	X	X	X	X	X	X	X
OK			X	X		X	X
OR							X
PA	X	X	X	X	X	X	X
RI	X	X	X		X	X	X
SC			X	X	X		
SD	X	X	X	X	X	X	X
TN	X	X	X	X	X	X	X
TX	X	X	X	X	X	X	X
UT						X	X
VT.							
VA				X	X	X	
WA		X	X	X	X	X	X
WV	X	X	X	X	X	X	X
WI			X	X	X	X	X
WY							X
U.S. TOTAL	20	28	32	35	33	41	47

Source: EPF tabulations of UI data.

Statement of LPA

Madame Chairman and Distinguished Members of the Subcommittee:

Thank you for the opportunity to submit this testimony to your Subcommittee on the critical issue of whether using unemployment compensation funds, collected to help those involuntarily unemployed, to pay benefits to those voluntarily taking family leave is good policy and whether it is appropriate for the Department of Labor ("DOL" or the "Department") to circumvent Congress in ordering this dramatic redirection of the unemployment insurance system.

LPA, Inc. is a public policy advocacy association of senior human resource executives and over 250 major corporations. LPA's purpose is to ensure that employment policies in the United States support the goals and interests of its member companies and their employees, and it regularly represents the interests of its members on these issues. Collectively, LPA members employ over 12 million individuals, roughly 12% of the private sector workforce. LPA members therefore fund a significant portion of the costs of this country's unemployment compensation system and are extremely concerned about any proposals that would increase those costs or undermine the stability and viability of that system.

While we firmly support employers' efforts to accommodate the family needs of their workers, LPA is submitting testimony to express our strong opposition to the potential dilution of the federal unemployment insurance system through the Birth and Adoption Unemployment Compensation ("BAA–UC") regulations proposed by the DOL's Employment and Training Administration on December 3, 1999. See Notice of Proposed Rulemaking on Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67972 (proposed Dec. 3, 1999) ("NPRM"). On February 2, 2000, LPA filed comments on the proposed BAA–UC Program. These comments, prepared by the law firm of Jones Day Reavis and Pogue, establish the legal basis for a lawsuit LPA will file in federal court seeking an injunction against the regulations if they are finalized.

We wish to make it clear at the outset that LPA and its member companies are strongly committed to enabling American workers to reconcile the conflicts between work and family needs. This is being done through a wide variety of innovative programs that have shown our members to be among America's most family-friendly companies. While we oppose this attempt to compensate birth-and-adoption leave under a program clearly designed to address other needs, any responsible attempts by Congress to remove existing legal impediments to birth-and-adoption leave under the wage/hour, tax, and other laws would obviously receive a warm welcome from our members.

In the view of LPA and its member companies, there are a number of defects in the proposed BAA–UC regulations. First and foremost, if the proposed BAA–UC regulations were widely adopted, they would increase the costs of the unemployment compensation system, which are almost entirely borne by employers. Depending upon how the states responded, these costs could very likely double to more than $50 billion per year, thereby undermining the financial stability and viability of the unemployment compensation system. The $30 billion a year that full BAA–UC coverage would cost, in turn, would increase the taxes paid by employers by 34% on average, imposing a massive burden on employers. In addition, the proposed regulations cannot be reconciled with the requirements of the Federal Unemployment Tax Act ("FUTA") or with the provisions of the Family and Medical Leave Act of 1993 ("FMLA"). Adoption of the proposed regulations would also be arbitrary and capricious because, among other things, the NPRM fails to offer any justification for the Department's abrupt change of position on BAA–UC.

PAID BIRTH-AND-ADOPTION LEAVE SHOULD NOT BE CREATED THROUGH THE UNEMPLOYMENT COMPENSATION SYSTEM

LPA members and their companies strive to accommodate the needs of parents and families in a number of different ways, with flexible work schedules, leave, both paid and unpaid, and other innovative employment practices. It is, however, both unwise and inappropriate to permit states to provide wage replacement to parents on birth-and-adoption leave through the unemployment compensation system. However laudable it is to assist employees in balancing the demands of an increasingly competitive and intense workplace with the needs of their families and personal lives, the unemployment compensation system is not the proper method for implementing such a policy.

As the Employment Policy Foundation has pointed out, the authorization of unemployment compensation for birth-and-adoption leave would impose a potentially massive financial burden on employers and an already-underfunded UI system. See Letter from Edward E. Potter to Grace A. Kilbane, Jan. 26, 2000, available at http://www.epf.org/documents/20000126.pdf. Although the Department estimates that the cost of its proposed regulations would be minimal, "from zero to approximately $68 million," this estimate is based upon the assumption that only a small number of states are interested in providing birth-and-adoption leave unemployment compensation. If, however, such unemployment compensation is adopted by all the states, the cost of providing birth and adoption unemployment compensation could climb as high as $30 billion. As the entire unemployment system currently pays out only about $20 billion per year, full adoption of BAA–UC would more than double the pay outs in the entire system. Moreover, even assuming that the economy will continue to grow, the unemployment funds in as many as 46 states and the District of Columbia would face insolvency within three years if they were to adopt birth-and-adoption leave pursuant to the proposed regulations. In addition, based upon conservative assumptions, states would on average have to increase their unemployment compensation taxes by 34% to pay for this shortfall.

In addition, the unemployment compensation system is ill-equipped to deliver wage replacement to parents on birth-and-adoption leave, just as birth-and-adoption leave is ill-suited for the unemployment compensation system. One of the enduring strengths of that system is its simplicity and focus. The system is not designed to have the flexibility to deal with birth-and-adoption leave. Although Congress found that unpaid family leave was too burdensome to impose upon small business and therefore exempted them from the obligations imposed by the FMLA, no similar exception can be carved out of the unemployment compensation system because, as the NPRM recognizes, any eligibility test for unemployment compensation must relate directly to the fact or cause of the individual's unemployment. Thus, by encouraging workers to take birth-and-adoption leave, the proposed regulations would require all businesses to plan for, find, and train replacement personnel, no matter how burdensome doing so may be in light of a small business' limited resources. Similarly, under the unemployment compensation system, the payment of birth-and-adoption leave unemployment compensation cannot be limited to one parent in each family, denied to highly-compensated individuals, or adjusted to reflect the means and needs of claimants. In short, the unemployment compensation system is not well-suited for dealing with the complexities of birth-and-adoption leave.

It has not been demonstrated that the burdens of BAA–UC would be counterbalanced by any benefits relevant to the unemployment compensation system. In the NPRM, the Department hypothesizes that providing parents on birth-and-adoption leave with unemployment compensation would be consistent with the goals of the system because it would ultimately promote their attachment to the work force. Notably absent from the NPRM, however, is any solid evidence that BAA–UC would have this effect.

Finally, the provision of unemployment compensation for birth-and-adoption leave would create an unstable and pernicious precedent. As there is no tenable distinction between birth-and-adoption leave and other forms of personal leave, once unemployment compensation were provided to individuals taking the former, there would be an irresistible pressure to extend compensation to the latter, as the NPRM itself appears to recognize. If that were to happen, however, the unemployment compensation system would be transformed from a focused and relatively uncontroversial insurance program into an over-stretched and difficult-to-maintain source of funds for programs that may or may not have the support of the public and the business community. The Department should not jeopardize the unemployment compensation system in this way.

THE PROPOSED REGULATIONS CONFLICT WITH FEDERAL UNEMPLOYMENT COMPENSATION LAW

In this country, unemployment compensation is provided through a cooperative federal-state system in which a federally-collected tax is used to finance state unemployment compensation programs that meet certain minimum federal requirements. One of the most fundamental requirements imposed by federal law is that the money made available through this system be used solely for the payment of "unemployment compensation." 26 U.S.C. § 3304(a)(4). In this context, the term "unemployment" has a well-established and understood meaning: It requires claimants to be (1) without a job; (2) able and available for work; and (3) involuntarily without work, which normally means that claimants must be actively seeking work. As LPA makes clear in the comments it filed with DOL in response to the NPRM, these re-

quirements are inherent in the plain language of FUTA and are confirmed by the legislative history of FUTA; the amendments to the Act and the Act's statutory predecessor; the administrative interpretations stretching from the enactment of FUTA's predecessor in 1935 up until the current NPRM; and the Supreme Court's interpretation of FUTA.

The proposed regulations cannot be reconciled with the statutory requirements for unemployment. Indeed, the NPRM does not even attempt to reconcile the proposed regulations with the joblessness and involuntariness requirements. The proposed regulations would authorize payments of unemployment compensation to individuals who have jobs but are simply taking temporary leave, who have chosen to make themselves unavailable for work, and who are not seeking work. Indeed, the model state legislation included in the NPRM would effectively preclude the application of the joblessness, availability, and involuntariness requirements to BAA–UC claimants, thereby virtually stripping the term "unemployment" out of unemployment compensation. The DOL's prior treatment of state law provisions concerning temporary layoffs, illness, jury duty, and training does not provide any justification for the proposed regulations. Congress has not delegated to the Department authority to carve out exceptions to the fundamental restrictions imposed on state unemployment programs in service of goals that, whatever their benefits, are foreign to federal unemployment compensation law.

THE PROPOSED REGULATIONS CONFLICT WITH THE CONGRESSIONAL REQUIREMENT THAT FAMILY-RELATED LEAVE BE UNPAID

The proposed regulations are also inconsistent with the FMLA because they effectively require employers to pay for birth-and-adoption leave. Although the proposed regulations on birth-and-adoption leave would clearly be linked to the FMLA's family leave provisions and could create confusion between BAA–UC and FMLA, the NPRM does not attempt to reconcile the proposed rules with the FMLA. This is not surprising. In the FMLA, Congress struck a delicate and purposeful balance between the burden on employers and benefits to employees: While the statute requires employers to grant familyand-medical leave to employees, including leave for birth and adoption, it explicitly provides that such leave "may consist of unpaid leave," thereby protecting employers from federal requirements that such leave be paid. Indeed, even the FMLA's chief sponsor, Rep. Patricia Schroeder (D–CO), made it clear that there would be no federal unemployment compensation for leave under the FMLA:

"The leave is unpaid, so your paycheck will stop. There is no federal compensation such as unemployment."

139 Cong. Rec. E2010 (daily ed. Aug. 5, 1993) (emphasis added).

The proposed regulations disrupt the balance struck by Congress. The FMLA's savings clause confirms this. Although that clause states that nothing in the FMLA "shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act," it leaves no room, absent separate statutory authority, for a federal agency construing federal law to require paid leave in disregard of the protections that Congress chose to provide employers.

THE PROPOSED REGULATIONS ARE ARBITRARY AND CAPRICIOUS

Even apart from their conflict with FUTA and the FMLA, the proposed regulations are arbitrary and capricious. First, the NPRM fails to consider obviously relevant factors such as the policies underlying the FMLA and the massive cost of funding birth-and-adoption leave through the unemployment compensation system. Second, the NPRM fails to justify the Department's departure from its long-standing interpretation of FUTA's unemployment requirements. For decades, the Department has refused to permit payment of unemployment compensation to individuals who remain out of work for personal reasons, and in 1997 it expressly rejected a Vermont proposal to pay unemployment compensation to individuals on family leave. See Letter from Raymond J. Uhalde to the Hon. Patrick Leahy, July 17, 1997. The NPRM does not explain why the Department has suddenly departed from these positions and, more generally, from the joblessness, availability, and involuntariness requirements that it has recognized for more than sixty years. Third, the NPRM fails to draw a reasoned distinction between the proposed regulations' authorization of unemployment compensation for individuals on birth or adoption leave and the Department's refusal to authorize compensation for other types of family and personal leave.

THE PROCESS BY WHICH THE PROPOSED BAA–UC REGULATIONS ARE BEING CONSIDERED IS DEFECTIVE

Finally, the rulemaking suffers from two procedural defects. First, the NPRM violates the Administrative Procedure Act ("APA"). Although the APA guarantees the public an opportunity to participate in the rulemaking process by requiring agencies to consider and respond to comments submitted by the public, the President has short-circuited that process here by directing the Department to issue regulations authorizing BAA–UC and thereby preventing the public from playing any meaningful role in the decision whether to issue such regulations. Second, this rulemaking fails to comply with the Regulatory Flexibility Act ("RFA"), under which any proposed rule affecting small businesses must be accompanied by a regulatory flexibility analysis that, among other things, describes any significant alternative to the proposed rule that would minimize the impact on small businesses. The NPRM neglected to include any such analysis on the theory that the proposed regulations will have no effect on small businesses. Plainly, however, if the regulations are promulgated and states authorize BAA–UC pursuant to them, small businesses will feel the effect of the regulations in the form of higher taxes, increased absenteeism, and decreased productivity. Thus, an initial regulatory flexibility analysis must be formulated and made available for public comment.

CONCLUSION

Although LPA members and other employers are attempting to accommodate the family needs of their employees, we must oppose this attempt to undermine the nation's 65-year-old unemployment compensation system by seeking to serve needs that clearly fall outside those that the system was designed to address. The unemployment compensation system is not well-suited to deal with birth-and-adoption leave because it does not have the flexibility to deal with matters such as the interests of small businesses or needs testing. In addition, BAA–UC would impose a massive financial burden on the unemployment compensation system, necessitating an increase in taxes of an average of 34% per state to cover the shortfall that would be created by nationwide coverage. The proposed regulations also create an unstable and pernicious precedent that may transform unemployment compensation from a focused, well-functioning, and uncontroversial program into an over-stretched and controversial one. The fundamental flaw in DOL's approach from which all of our criticisms emerge is that it is seeking to do something that only Congress can accomplish. We strongly support any efforts by this Committee to forestall this dangerous precedent.

Thank you for consideration of our views.

MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401–1991
March 3, 2000

The Honorable Nancy L. Johnson, Chairman
Subcommittee on Human Resources
Committee on Ways & Means
Room B–317, Rayburn Building
U.S. House of Representatives
Washington, D.C. 20515

Re: Birth and Adoption Unemployment Compensation Regulations (64 Fed. Reg. 59918, Dec. 3, 1999)

Dear Chairman Johnson:

As members of the Maryland House Economic Matters Committee and having jurisdiction for unemployment insurance issues, we are aware from national media reports that the State of Maryland has been cited as one of four states (Maryland, Massachusetts, Vermont and Washington) that has expressed interest in the BAA–UC experimental program. We write to set the record straight regarding Maryland's interest in the proposal being promulgated by the U.S. Department of Labor.

House Bill 1124, *Unemployment Insurance-Eligibility for Benefits-Birth or Adoption of Child,* was introduced during the 1999 Session of the Maryland General Assembly. House Bill 1124 provided 12 weeks of unemployment compensation for individuals who leave work immediately following the birth or adoption of their child,

if they are the primary care giver and are not otherwise entitled to wages or salary from their employer. Maryland's Unemployment Insurance Office opposed the legislation because: (1) it would place Maryland out of conformity with federal law under the "able and available for work" requirement; and (2) it would negatively impact the Unemployment Insurance Trust fund balance. Allowing an entirely new category of individuals to file for and receive unemployment insurance benefits would deplete Unemployment Insurance Trust Fund revenues and trigger an increase in the surtax. The legislation was promptly defeated in the House Economic Matters Committee. This was the extent of Maryland's involvement in the issue at the time DOL issued the BAA–UI proposal.

Identical legislation has been reintroduced during the 2000 Session of the Maryland General Assembly (HB 1198 and SB 167). HB 1198 is scheduled for public hearing in the House Economic Matters Committee on March 9, 2000. Interestingly, neither bill reflects the content of the model legislation proposed by DOL. Again, the Maryland Unemployment Insurance Office is opposing the legislation as incompatible with the unemployment insurance system, and estimates the financial impact on the Unemployment Insurance Trust Fund to be $68 million annually. If enacted, this legislation would trigger a .4% increase in the unemployment insurance surtax in Maryland, costing *all* Maryland employers an increased unemployment insurance tax liability of $34 *per employee*.

Contrary to national media reports, there is little sentiment in Maryland to enact legislation that increases the tax liability of businesses by allowing birth and adoption leave to be financed through the unemployment insurance system. We hope this clarifies for the record Maryland's limited interest in this issue.

Sincerely,

DELEGATE VAN T. MITCHELL
[D–Charles Co.]

DELEGATE RICHARD LA VAY
[R–Montgomery Co.]

MECHANICAL CONTRACTORS ASSOCIATION
OF AMERICA, INC.
ROCKVILLE, MARYLAND 20850–4340

January 27, 2000

Ms. Grace Kilbane
Director, Unemployment Insurance Service
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S–4231
Washington, DC 20210

RE: Birth and Adoption Unemployment Compensation, 20 CFR Part 604, 64 Fed. Reg. 67,972 (Dec. 3, 1999).

Dear Director Kilbane:

The Mechanical Contractors Association of America (MCAA) opposes the proposed rule that would provide unemployment insurance benefits to individuals who are able yet unavailable to work:

- Federal unemployment insurance law requires that claimants be "able and available" to work.
- The proposed rule circumvents the statutory requirements of the Family Medical Leave Act (FMLA).
- The original purpose of unemployment insurance should not be expanded for voluntary leave.
- Unemployment insurance benefits must be available for unemployed workers when the economic cycle turns and unemployment rises.

1. Federal unemployment insurance law requires that claimants be "able and available" to work.

Up until the Administration's change in policy this summer, the Department of Labor's (DOL) long-standing administration of the Federal Unemployment Tax Act (FUTA) has required that unemployment insurance claimants be "able and avail-

able" to work. While there are four exceptions to this requirement—training, illness, jury duty, and temporary layoffs—none of them are voluntary, temporary withdrawals from employment with the intention of returning to the same job.

2. The proposed rule circumvents the statutory requirements of the Family Medical Leave Act (FMLA).

FMLA provides up to twelve weeks of unpaid leave to employees who work for employers of at least 50 employees. Employees must have worked for the employer for a minimum of 1,250 hours during the previous twelve months to qualify for family leave.

The proposed rule would prohibit the application of unemployment benefits eligibility factors unrelated to the cause of unemployment, e.g., employer size. Therefore, the carefully crafted compromises in the FMLA on employer size and job tenure—worked out by executive and legislative officials—would be circumvented by a unilaterally imposed, unnegotiated rule. Furthermore, extending unemployment insurance benefits to employees who voluntarily leave work for a short time period is very controversial; it is so controversial that the Commission on Leave, a board created by FMLA to study workforce issues, did not include such a recommendation in its report to Congress, *A Workable Balance: Report to Congress on Family and Medical Leave Policies.*

MCAA's members are heating, air conditioning, refrigeration, plumbing, piping, and service contractors who perform new construction, service, and maintenance of mechanical and HVAC systems. They rely on a stable workforce of highly skilled employees to perform highly technical construction within strict timeframes and other highly variable work sequence schedules, including inclement weather. A stable, always available workforce is an essential element of quality construction. The proposed rule would add an element of uncertainty into the workforce planning that would negatively impact contractors' ability to perform.

3. The original purpose of unemployment insurance should not be expanded.

According to a January 1996 report by the Advisory Council on Unemployment Compensation, *Defining Federal and State Roles in Unemployment Insurance—A Report to the President and Congress (Report to the President),* "The fundamental objective of the [unemployment insurance] system is the provision of insurance in the form of temporary, partial wage replacement to workers experiencing involuntary unemployment." Unemployment insurance benefits serve a narrow purpose—to provide temporary assistance to workers who are involuntarily unemployed and who are seeking employment. That purpose should not be expanded into a sort of publicly mandated employee benefits measure administered by the state and federal government.

4. Unemployment insurance benefits must be available for unemployed workers when the economic cycle turns and unemployment rises.

According to *Report to the President,* "[The] second objective of the [unemployment insurance system] is the accumulation of adequate funds during periods of economic health, thereby promoting economic stability by maintaining consumer purchasing power during economic downturns." Unemployment insurance benefits lessen the burdens of those hard economic times and become a macroeconomic tool to keep up demand. The system should not be expanded so as to jeopardize its fundamental purpose.

Sincerely,

JOHN MCNERNEY
Executive Director for Government and Labor Relations

Statement of Judith L. Lichtman, President, National Partnership for Women and Families

As the leaders of the growing movement to make family leave more affordable, the National Partnership for Women & Families wholeheartedly supports the proposed regulation that is the topic of today's hearing. Formerly the Women's Legal Defense Fund, the National Partnership wrote the first draft of the Family and Medical Leave Act (FMLA) and led the nine-year fight for its passage. In 1999, the National Partnership launched the Campaign for Family Leave Income, a multi-

year initiative to make family and medical leave more affordable for all working Americans.

Encouraging states to provide unemployment insurance to new parents is the right move for working families. This new form of unemployment coverage will let millions of mothers and fathers help their children thrive during the critical months after birth and adoption. It will alleviate a major source of economic pressure on working families. And it will put our nation's policies more in sync with the realities facing today's workforce.

This concept is catching fire in the states. Legislators around the country are introducing new bills that would extend their state unemployment benefits to new parents. In fact, legislative efforts to provide some income during family leave are already underway in at least 13 states: California, Connecticut, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Vermont, Washington.

Since the FMLA became law in 1993, more parents are spending precious time with new babies, fewer children have to face hospital stays alone, and more workers can care for their parents in an emergency. In almost seven years, the FMLA has helped some 26 million women and men care for their loved ones and keep their jobs, without harming employers.

The FMLA was a critical first step, but it was not enough. Too many Americans simply cannot afford to take the unpaid leave the law provides. The bi-partisan Family Leave Commission found that lost wages are the number-one reason people do not take needed leave. Sadly, nearly one in ten FMLA users is forced onto public assistance while on unpaid leave. At a time when we have such a strong economy—and working families need relief so urgently—this regulation is a major step forward that can make a real difference in the lives of millions of Americans.

Providing Family Leave Income Through Unemployment Insurance

QUESTIONS & ANSWERS

On December 3, 1999, the Department of Labor proposed a new federal regulation that encourages states to let new parents collect unemployment insurance while on unpaid family leave. This document answers some of the most common questions about using unemployment insurance to provide family leave income and about the upcoming regulation.

Background

Since the Family and Medical Leave Act (FMLA) was enacted in 1993, it has helped at least 24 million Americans take up to 12 weeks of unpaid, job-protected leave to care for their new babies and sick family members, and to recover from their own serious illnesses, without hurting businesses. Yet too many women and men simply cannot afford to take unpaid leave, even when their families need them most. The bipartisan Family Leave Commission found that nearly two-thirds of employees who did not take needed leave cited lost wages as the primary reason.

In June 1999, the National Partnership for Women & Families launched the Campaign for Family Leave Income, a multi-year initiative to make family and medical leave more affordable for all working Americans. "Family leave income" (FLI) describes a variety of ways to help people afford time off when a baby is born or adopted, when a close relative is seriously ill, or when workers themselves need medical care.

Unemployment insurance is one of the most widely considered and promising vehicles for providing FLI. Legislators and advocates in several states—including Connecticut, Georgia, Illinois, Indiana, Maine, Massachusetts, Maryland, New Hampshire, New Jersey, Oregon, Vermont, and Washington—are considering extending unemployment benefits to employees taking family or medical leave. A 1998 National Partnership survey found that most Americans—79%—support this approach.

Family Leave Income and Unemployment Insurance

Why should unemployment insurance be used to provide FLI benefits?

Originally a safety net primarily for male breadwinners, unemployment insurance was designed with the assumption that women could devote themselves exclusively to family needs. With the massive entry of women into the workforce and the rapid aging of the population, along with an historically high demand for workers, the unemployment insurance system must evolve to accommodate the real-life challenges facing today's families: more people need care, but fewer people are available to provide that care without compensation. Using unemployment insurance to provide FLI benefits would help update the unemployment system to fit the changing composition of the American workforce and the American family.

Won't it be very expensive to provide FLI through unemployment insurance?

No. Because it is based on an insurance model, providing FLI this way is very inexpensive. For instance, extending unemployment benefits to Massachusetts workers on family or medical leave is estimated to cost no more than a modest $1.25 per covered worker per week. Further, in states with such proposals, the cost can be fully offset by unemployment fund surpluses—surpluses that states like Massachusetts are considering simply returning to employers in the form of tax cuts.

At the same time, the hidden costs of *not* having FLI are substantial. The costs to employers include higher turnover and replacement costs and lower productivity when employees are forced either to forgo needed time off from work or to leave their jobs entirely. The costs to society include increased health care and public benefits expenses. In fact, the bipartisan Family Leave Commission found that nearly one in ten leave-takers, and 12% of women leave-takers, were forced onto public assistance during leave.

But isn't unemployment just for people who get laid off?

Since its creation in the 1930's, the unemployment insurance system has given states considerable flexibility in determining how best to use their unemployment funds, including setting eligibility requirements. Many states have found it worthwhile to provide unemployment benefits to people in situations that do not fit the narrow, traditional criteria of being involuntarily laid off and immediately available for work. Examples of such state policies now in place with the approval of the U.S. Department of Labor include the following:

- Employees who are temporarily laid off, but will be "recalled" to work for the same employer, are not required to be "available" to work for anyone else to be eligible for unemployment benefits in seven states. Similarly, people who are temporarily not working because they are on family or medical leave also want and intend to return to the same job: the bipartisan Commission on Leave found that 84% of employees who take FMLA leave return to their jobs.
- Several states provide benefits to workers who become unemployed and then develop a physical condition that prevents them from working. Employees who must take medical leave to recover from a physical disability are in essentially the same position. The mere timing of their disability should not control employees' access to benefits.
- One-third of states already recognize that employees who must leave their jobs for an urgent and compelling reason—such as a spouse getting relocated or the inability to find child care—still deserve unemployment benefits, even though they were not laid off.
- People enrolled in approved job training programs receive benefits, even though they are allowed to turn down work during their training periods. Such employees are no more available for work than employees taking family or medical leave.

Won't providing FLI endanger unemployment insurance trust funds in times of recession?

No. The real threat to trust funds comes not from an expansion of unemployment benefits, but from repeated and dramatic employer tax cuts. Even as American businesses have enjoyed record-breaking profits, they have been lobbying aggressively and successfully for large cuts in their unemployment taxes: at least 15 states have cut unemployment taxes sharply in the past five years, and legislation to lower taxes is pending in many more. Ironically, some of the same business groups insisting that providing FLI would "devastate" state trust funds are still calling for cuts that would deplete those same funds—but would benefit their own bottom line. For example, Massachusetts business interests oppose using unemployment insurance for family or medical leave, even as they lobby for tax cuts equal to the entire cost of providing FLI throughout the state.

In fact, many states are well positioned for an expansion of unemployment insurance benefits to include employees on family and medical leave. State trust fund reserves increased 85% overall from the end of the last recession in 1992 through 1998. Well over half the states have reserves that exceed solvency guidelines specifically designed to measure the ability to withstand a severe recession. These guidelines are calculated by averaging actual unemployment costs from the three worst economic downturns of the previous twenty years.

The President's Directive on Unemployment Insurance for New Parents

What was President Clinton's directive to the Department of Labor?

In May 1999, the President directed the Secretary of Labor to propose a new regulation confirming that states may offer unemployment insurance to working parents on leave to care for a newborn or newly adopted child.

How will the regulation be developed and when will it go into effect?

The Department of Labor issued a "notice of proposed rulemaking"—or draft regulation—on December 3, 1999. States and the public now have the opportunity to submit comments until **February 2, 2000**, as part of the process of developing the final regulation. An effectiveness date for the final regulation has not yet been set.

Why is this regulation necessary?

Four states (Maryland, Massachusetts, Vermont, and Washington) asked the Administration to confirm that they could use their unemployment insurance systems to offer FLI in accordance with federal law. In response, the President directed the Labor Department to clarify how states wishing to use unemployment insurance to assist new parents could put those plans into effect.

How long will people be able to take leave and receive pay?

States will be free to define the length of time employees may receive unemployment insurance while on family leave.

Who will be eligible for this new form of unemployment insurance coverage?

Each state may establish its own eligibility requirements.

Why should new parents be singled out for this benefit?

Providing FLI benefits to new parents is an important investment in the future workforce. Research shows that parental involvement is crucial to help babies develop physically, emotionally, and intellectually, and that children benefit from early parental attention long after they leave infancy.

While recognizing the needs of new parents, advocates for women, children, parents, seniors, and people with disabilities also strongly support making family leave affordable for those who need to care for seriously ill children or other family members or to recover from their own serious illness.

Right now, employers who fire more workers pay higher unemployment taxes—it's called "experience rating." Won't this regulation increase unemployment taxes for employers with more new parents on the payroll?

No. States can, and should, exempt this new form of unemployment coverage from experience rating.

Won't the new regulation force state governments to pay for people's individual choices?

No. State participation in this program is wholly voluntary. Indeed, the new regulation protects state governments' choice to provide FLI to new parents through unemployment insurance (or not). In choosing to set up FLI programs, states fulfill our collective responsibility to help young families thrive, to value caregiving, and to prevent poverty—all longstanding American values that are already reflected in a range of public policies, from Social Security to dependent care tax credits.

The Labor Department estimates that the annual cost of this regulation could range from $0–68 million. What does this range represent?

The Department of Labor based its cost estimate on data from the four states (Maryland, Massachusetts, Vermont, and Washington) that asked the Administration to provide guidance on providing FLI through their unemployment insurance systems. If no state enacts UI/parental-leave legislation, the annual cost of the regulation will be 0, while if all four of these states enact legislation, the Labor Department estimates that the total annual cost will be around $68 million. This estimate reflects the Labor Department's assumptions about how many people are likely to use the benefit. Several other independent studies have also estimated the cost of providing unemployment insurance benefits to employees on parental leave. These studies are summarized on our website at www.nationalpartnership.org/ workandfamily/fmleave/expansion/ uitdichart1.htm.

How many states can participate?

The regulation does not limit the number of states that can participate. A state simply must amend its unemployment insurance law to include parental leave.

Isn't this a backdoor way of addressing a question that Congress should decide?

No. In creating the national unemployment compensation system in 1935, Congress envisioned a federal-state cooperative scheme that would provide a uniform national floor for the benefits states could grant, while leaving states otherwise free to develop eligibility criteria that would offer more generous coverage and benefits. When questions about this scheme have arisen, however, states have routinely asked the Department of Labor to clarify the law, as four states did in this case.

This document was produced by the **Campaign for Family Leave Income,** *a project of the National Partnership for Women & Families. For more details about state proposals and programs and the Campaign for Family Leave Income, please see www.nationalpartnership.org or call 202/986–2600.*

State Family Leave Income Initiatives

MAKING FAMILY LEAVE MORE AFFORDABLE

Around the country, activists for women, children, seniors, and working families are organizing to make family leave more affordable through family leave income. Efforts have been undertaken in at least nine states to provide family leave benefits. For example, many states are considering expanding unemployment or disability insurance to provide some pay during periods of unpaid family and medical leave.

• Most Americans—fully 82% of women and 75% of men—support such "family leave insurance" proposals.*

Currently, the federal Family and Medical Leave Act (FMLA) guarantees covered employees 12 weeks of *unpaid* leave each year to care for a newborn or newly adopted child or seriously ill family member (family leave), or to recover from their own serious health condition (medical leave). The FMLA was an essential step toward recognizing Americans' work and family responsibilities. However, because FMLA leave is unpaid, many employees cannot afford to take time off at the very time their families need them most.

• The bipartisan Family Leave Commission found that nearly two-thirds of employees who needed but did not take family or medical leave cited lost wages as the reason.**

Existing public and private responses are limited. For instance, five states (as well as Puerto Rico) require employers to offer temporary disability insurance (TDI), which provides partial wage replacement to employees who are temporarily disabled for non-work-related reasons, and many employers voluntarily offer TDI as an employee benefit. While TDI covers disabilities arising from pregnancy or childbirth, TDI currently offers no benefits for employees who take leave beyond the period of maternal disability, or take leave for paternity, for adoption, or to care for seriously ill family members. Although the five states with TDI systems employ 22% of working Americans, employees in other states have no such coverage guarantees.

To make family leave more affordable for more Americans, state legislators, activists, and researchers are mobilizing behind a range of innovative proposals. Attached is a sampling of current state efforts compiled by the National Partnership for Women & Families as the leader of the Campaign for Family Leave Income.

CALIFORNIA

A dynamic coalition of advocates for women, children, and labor has advanced a family leave agenda for the 1999–2000 legislative session. In February 2000, a bill was introduced requiring employers with five or more workers to offer at least six days of paid sick leave to their full-time low-wage employees. In 1999, California enacted a law requiring a study of the cost of extending the state's TDI program to cover family leave, and increasing the weekly TDI benefit cap from $336 to $490. Also in 1999, California passed a law requiring employers who offer paid sick leave to let employees use some of their sick leave to care for a sick child, parent, or spouse.

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State Senator Tom Hayden
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Lisa Ecks
California Labor Federation
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Netsy Firestein
Labor Project for Working Families
(510) 643–6814
Assemblyman Wally Knox
(323) 932–1201
Aimee Durfee and Emily Katz Kishawi
Equal Rights Advocates
(415) 621–0672
Patricia Shiu
Employment Law Center
(415) 864–8848

CONNECTICUT

The Connecticut General Assembly's Labor and Public Employees Committee introduced a bill in February 2000 to provide unemployment benefits to workers on parental leave. The bill would also create a "Family and Medical Leave Insurance

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*National Partnership for Women & Families, Family Matters: A National Survey of Women and Men, 1998.

**Commission on Leave, A Workable Balance: Report to Congress on Family and Medical Leave Policies, 1996.

Fund," financed by an employer payroll tax, that would pay benefits to employees taking leave to care for a seriously ill family member or to recover from a serious health condition. The cost of offering benefits equal to unemployment compensation to workers on family and medical leave has been estimated to cost as little as 28 cents per covered worker per week, and no more than $1.15 per employee per week. The Labor and Public Employees Committee recently held a hearing on the bill at which a wide range of legislators, advocacy groups, unions, and leave-takers testified in support of the proposal.

Contact:
State Representative Christopher Donovan
(860) 240–0540
Leslie Brett
Connecticut Permanent Commission on the Status of Women
(860) 240–8300

ILLINOIS

A bill was introduced in February 2000 to provide up to 12 weeks of unemployment benefits to workers on any approved FMLA leave and to workers who leave a job for any reason specified in the FMLA.

Contact:
State Representative Julie Hamos
(217) 782–8052
Lindsey Crawford
Women Employed
(312) 782–3902

INDIANA

In January, 2000, Indiana House legislators introduced a bill that would provide up to 12 weeks of unemployment insurance benefits to parents who take leave to care for a newborn or newly adopted child. The bill passed by a 52–44 vote, with bipartisan support. The Senate is now considering the legislation; it has been referred to the Committee on Pensions and Labor.

Contact:
State Senator Anita Bowser State
(317) 232–9400
Representative Linda Lawson
(317) 232–9600

IOWA

A bill introduced during the 1998 legislative session would have established a fund for providing benefits to employees on family leave. It would also have created a work and family task force to examine the impact of this family leave insurance program.

Contact:
State Senator Michael Gronstal
(515) 281–3901

MARYLAND

Bills were introduced in the House and Senate in February 2000 to provide up to 12 weeks of unemployment insurance benefits to parents who take leave to care for a newborn or newly adopted child. Several local groups, including the Maryland Women's Law Center and the Public Justice Center, have been working to support the bill. A hearing before the House Committee on Economic Matters is scheduled for March 9. During the 1999 session, Maryland passed a law requiring employers that grant paid leave to workers following the birth of a child to grant the same leave to employees who adopt a child.

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Delegate Michael Dobson
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Denise Davis
Maryland Women's Law Center
(410) 321–8761
Debra Gardner
Public Justice Center
(410) 625–9409

MASSACHUSETTS

Spearheaded by the Women's Statewide Legislative Network, a diverse and active Family Leave Coalition is rallying support for a bill to extend unemployment benefits to employees taking family and medical leave. The estimated cost of providing unemployment benefits for family and medical leave is less than $1.25 per week per

employee. Also pending is a bill aiming to create a "family and employment security trust fund." In April 1999, the state legislature's Joint Committee on Commerce and Labor (chaired by Senator Steven Lynch, sponsor of the unemployment insurance bill) held a hearing on the two bills. A broad array of researchers, legislators, advocates, and leave-takers testified in support of the bills, and the hearing was widely and favorably reported by media across the state. The bills are currently pending in the Joint Committee on Commerce and Labor. Further, Massachusetts recently unveiled a $13 million plan to make the state a more "family friendly" employer, including a proposal to allow state workers to use up to 12 weeks of accumulated sick leave for maternity or adoptive leave without a doctor's note.

Contact:
Monica Halas
Greater Boston Legal Services
(617) 371–1270, ext. 621

Women's Statewide Legislative Network
(617) 426–1878

State Representative Anne Paulsen
(617) 722–2140

Linda Johnson

MINNESOTA

In February 2000, two bills were introduced in the Minnesota House and Senate that would provide income to employees taking leave to care for a newborn or newly adopted child. One bill (SF 3541/HF3869) would establish a "voluntary paid parental leave program" that would partially reimburse employers that provide "qualified paid parental leave." Another bill (SF2996/HF3605) would provide benefits under a "birth and adoption leave program" financed through unemployment insurance funds. Since July 1998, a state-funded, at-home infant child care program has allowed working parents who fulfill income eligibility requirements to receive subsidies for caring for infants under the age of one.

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Children's Defense Fund–MN
(651) 227–6121

State Senator Jerry Janezich
(651) 296–8017

Cherie Kotilineck
(651) 582–8562

Department of Children, Family & Learning

State Senator Ellen Anderson
(651) 296–5537

NEW HAMPSHIRE

The New Hampshire House of Representatives is currently considering a bill to establish a committee to study a broad range of options for providing benefits to New Hampshire employees who take family and medical leave.

Contact:
State Representative Mary Stuart Gile
(603) 224–2278

Jonathan Baird

New Hampshire Legal Assistance
(603) 542–8795

NEW JERSEY

The New Jersey legislature will consider at least two family leave income initiatives this session. Bill A3027, introduced in February 2000, would extend unemployment insurance benefits to employees who take leave to care for a newborn or newly adopted child and TDI benefits to employees who take leave to care for an ill parent, child, or spouse. Another bill introduced this legislative session—A1577—would also extend benefits for leave taken to care for newborn or newly adopted children or ill parents, children or spouses, but would do so solely through the statewide TDI system.

Contact:
Laurel Brennan
New Jersey AFL–CIO
(609) 989–8730

Assemblywoman Arline M. Friscia
(732)–634–2526

Assemblyman Charles Zisa
(201)–996–8040

NEW YORK

A dedicated group of labor unions is generating support for family leave insurance in New York. A bill has been introduced to amend New York's TDI law to cover employees taking family leave.

Contact:
Assemblywoman Catherine Nolan
Attention: Geri Reilly
Counsel for Labor Committee
New York State Assembly
(518) 455–4311

Deborah King
New York Union Child Care Coalition
AFL–CIO
(212) 494–0524

VERMONT

A bipartisan bill was introduced in the 2000 legislative session to authorize a three-year pilot program, financed through Vermont's general fund, that would provide partial pay for employees who take leave to care for newborn or newly adopted children. The estimated cost of providing income to Vermont workers on parental leave is less than 15 cents per week per employee. In February 2000, the Senate Committees on Appropriations, Finance, and General Affairs and Housing held hearings on the bill.

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State Senate President Peter Shumlin
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State Senator Cheryl Rivers
(802) 828–2228
State Senator Peter Illuzzi
(802) 828–2228

Michael Sirotkin and Adam Necrason
Vermont AFL–CIO
(802) 223–9988

WASHINGTON

In early February 2000, the Washington State Senate Committee on Labor and Workforce Development held hearings on, and passed, a bill providing 5 weeks of unemployment benefits for employees taking leave to care for newborn or newly adopted children. The witnesses, who all supported the bill, included a pediatrician, advocacy groups, union representatives, and parents who had suffered financially in taking unpaid family leave. Similar legislation is also pending in the Washington House of Representatives, where the Children and Family Services Committee held a Work Session on Family Leave later in February that also featured strongly supportive testimony from advocates, labor representatives, and leavetakers. These proposals have been estimated to cost 11 cents per employee per week. Washington law already allows employees to use accrued sick leave to care for sick children.

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State Senator Lisa Brown
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(360) 786–7860

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Labor Council, AFL–CIO
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For more information about the Campaign for Family Leave Income, including a list of Advisory Committee members, a round-up of state proposals, and the latest news and research, please see our web site (www.nationalpartnership.org) or contact the National Partnership for Women and Families at 1875 Connecticut Avenue, NW, Suite 710, Washington, D.C. 20009, (202) 986–2600, info@nationalpartnership.org.

Statement of National Restaurant Association

The National Restaurant Association, representing America's 831,000 eating establishments, respectfully submits this statement regarding the Department of Labor's (DOL) proposed regulation to allow states to use their unemployment compensation (UC) funds to pay UC benefits to parents who take leave under the Family and Medical Leave Act (FMLA) for birth or adoption. As the nation's number one retail employer—providing jobs and careers for 11 million people—our members are eminently aware of the importance of providing meaningful benefits to employees and share the Subcommittee's commitment to helping American workers balance the needs of the family with the responsibilities of the workplace.

The Association strongly opposes the proposed rule, however, and is extremely concerned that the DOL is advancing this measure outside the proper process and without lawful consideration of its impact on workers, employers and the solvency of the UC fund. A short comment period, set over the holidays after Congress had adjourned, did not allow for the fundamental deliberation needed to evaluate such sweeping change to 65 years of labor law. The Administration's decision to force this expansion without proposed legislation ignores serious problems with the current FMLA and dismisses the authority of Congress and this Subcommittee to preserve the UC fund for unemployed workers.

Proposed Rule Contradicts Existing Labor Law

The proposed regulation erodes federal unemployment compensation law by raiding funds reserved for involuntarily unemployed workers to pay employed workers who voluntarily take FMLA leave. Eligibility for unemployment compensation benefits is defined by state and federal law under the cooperative state-federal system. 42 USC §§501–504 and 1101–1108. The term delineating the relief is "unemployment." As stated under 26 USC §3304(a)(4):

> all money withdrawn from the unemployment fund. . .shall be used solely in the payment of unemployment compensation [except in certain specified circumstances]. . ..

Indeed, "compensation" paid under UC is defined as "cash benefits payable to individuals with respect to their unemployment." 26 USC §3306(A). Using the unemployment fund to pay employees on FMLA leave *from employment* for childbirth or adoption is using the fund to support *leave during a period of employment, not unemployment.*

The DOL's argument about interpreting the "able and available" requirements when an employee is unemployed appears irrelevant. The issue is *not* whether the employee is "able and available" when he or she takes FMLA leave. Clearly, the employee is *not* "available" since the leave was taken for childbirth or adoption. Rather, the issue is whether temporary leave while employed should be funded by an unemployment compensation system.

Proposed Rule Jeopardizes The Unemployment Compensation Fund

Temporary leave should not be funded by a UC system. The UC system was designed to protect workers who lose their jobs when the employer no longer has work available. To receive UC benefits the unemployed worker must be seeking new work, and these benefits stop upon offer of an appropriate job. The proposed regulation would drain UC benefits away from the very people who rely on them and for whom the system was originally created.

As this Subcommittee is well aware, this misdirection is particularly remiss given that Congress has historically had to bail out numerous state UC funds. Critical funds will be diverted that are needed to pay standard UC claims for unemployed workers who do not have a job to which to return. Moreover, numerous implementation problems will burden state agencies that are ill equipped to administer this expansion to a new pool of claimants.

Proposed Rule Creates New Benefits Without Appropriate Funding

The amount an employer must pay into a state unemployment compensation system is determined in part by how many of the employer's "ex-employees" are awarded compensation. 1B *Unemployment Insurance Report* (CCH) 1120. Thus, by allowing employees on FMLA leave to claim "unemployment" compensation, the employer's payment into the UC fund will obviously increase, imposing a massive new tax burden on businesses. According to some estimates, the proposed regulation will add

a $68 billion a year payroll tax increase to the $30 billion employers already spend on the UC system each year.

This hefty payroll tax increase will subsidize employee leave for childbirth and adoption while crippling employers' ability to create new jobs and provide employee benefits. Payroll taxes will increase even for employers who are not covered by the FMLA. It is particularly troubling that the DOL would propose a change of such magnitude without lawfully evaluating the impact on small businesses.

Proposed Rule Abrogates Congressional Intent

Unlike the unemployment compensation program, the FMLA was created in 1993 to allow individuals who have a job and are working to take temporary time off for medical and family reasons. Congressional language expressly provided for *unpaid* leave in the FMLA. Conversely, the UC system was created to provide benefits to involuntarily unemployed workers. Workers taking FMLA leave are not unemployed and should not be added to the UC system.

To do so would misuse the UC system at great consequence to the solvency of those funds and the employers who subsidize them. In fact, serious problems with the current FMLA have not been addressed by the DOL and would be exacerbated by this proposed regulation. Although numerous implementation and abuse problems with the FMLA have been documented in three congressional hearings, the proposed regulation seeks to expand the FMLA without rectifying these existing burdens. This expansion would be in direct conflict with congressional intent and would establish a precedent for additional expansion.

We urge the Subcommittee to uphold the intent of Congress and preserve the UC fund for its original purpose, to provide benefits for unemployed workers, not employed workers taking temporary FMLA leave. The Association appreciates your consideration of these concerns and strongly supports any action the Subcommittee may take to prevent implementation of this ill-advised regulation.

Statement of Mark Wilson, Research Fellow, Heritage Foundation

Madam Chairman, Members of the Committee, thank you for the opportunity to submit this written statement for the record. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

On December 3, 1999, while Congress was in recess and Americans were busy with the holidays, the U.S. Department of Labor (DOL) published proposed new regulations in the Federal Register that both redefine what it means to be unemployed and allow states to pay workers who choose to stay home up to one year with their newborn or newly adopted children. The President's plan would put at serious risk the ability of states to pay unemployment benefits to laid-off workers.

Congress should not allow the President to unilaterally convert the Unemployment Insurance (UI) program into a huge new government entitlement program unrelated to unemployment. The current federal-state UI partnership—particularly the system's outmoded method of administration and financing—is already seriously flawed. Substantially changing the purpose of UI and expanding the program to cover family leave will only make these problems worse. The new program would pit employees who voluntarily choose (and in many instances can afford) to be out of work against workers who involuntarily lose their jobs.

Congress should repeal the federal unemployment surtax on workers' wages and transfer the UI system to the states. Senator Mike DeWine (R–OH) and Representative Jim McCrery (R–LA) have introduced the Employment Security Financing Act of 1999 (S. 462 and H.R. 3174), which would repeal the surtax, begin to reform the UI system, and prevent Washington from raiding the program to pay for new spending.

Governors Recognize Threat.

North Dakota Governor Ed Schafer, chairman of the Republican Governors Association, has said that UI "is not designed, equipped or adequately funded to pay for absences from work that are related to extended family leave." Michigan Governor John Engler has said that his state "will not put at risk the financial integrity of its unemployment insurance program." Even the Interstate Conference of Employment Security Agencies has expressed concerns with the potential cost of the proposed regulation.

If all 50 states provide just 12 weeks of benefits to new parents in the labor force, as recommended by DOL, the cost could be $11.3 billion per year—over one-half the

amount of regular benefits paid to out-of-work Americans in 1999. State UI benefit payments could balloon from $24.9 billion to $36.2 billion this year and quickly drain the trust funds. By 2002, state trust fund balances could fall by over 60 percent from $53.7 billion to just $21.4 billion, substantially threatening the ability of states to pay regular UI benefits to laid-off workers during the next economic downturn unless states increase taxes. Moreover, the cost of the program could explode if Washington expands it again to cover other types of leave such as illness and elder care.

Despite DOL's claim that the new program is designed to give states the "flexibility" to experiment with the UI program, the proposed regulation in reality gives them the flexibility to do only one thing: expand UI benefits to new parents. True flexibility would allow the states to conduct many different types of experiments, such as privatizing UI or offering other reemployment incentives that are not allowed under current law.

Higher Taxes, Slower Wage Growth, Fewer Benefits.

Without large state tax increases to pay for these new benefits, the payment of regular unemployment benefits to laid-off workers will be jeopardized. A number of states have automatic tax increases built into their UI systems that kick in when their trust fund balances fall below certain levels. In Ohio alone, taxes could increase by $900 million, nearly doubling the existing unemployment tax rate. Moreover, studies indicate that, on average, over 70 percent of the cost of all employer-paid payroll taxes is shifted to workers in the form of lower real wages.

Employees want creative pay and benefit packages, and they often choose their employers based on these packages. Employers know this and have incentives to compete for the best talent by offering innovative benefit packages. There is no need for the government to intervene. Many workers already have paid parental leave programs from their employers that pay more than what they would get from the UI system. However, DOL now proposes to reduce or eliminate the incentive to compete by substituting a new, less attractive government benefits program for all workers.

The Proposed Rule Effectively Creates an Employer Paid Severance Program.

DoL's proposed rule says that states may provide birth and adoption unemployment compensation (BAA–UC) to new parents without requiring that they return to their previous employer or demonstrate any attachment to the workforce. Since around 50 percent of new parents that take family and medical leave never return to their job this would dramatically alter the UI program by effectively creating an employer paid severance benefit for new parents. For the first time, workers who are new parents could receive a UI benefit without having to look for work or even return to work. New parents that sign up for the benefit and decide not to return to work would receive an average severance package of $2,520.

The Proposed Rule Creates a Permanent Program.

DoL's proposed rule describes the BAA–UC as an experimental program, but nothing in the proposal distinguishes it from any other permanent program. There is no sunset date, evaluation process, or other factor in the proposed rule that would suggest that this program is truly experimental.

The Proposed Rule Could Lead to Benefit Fraud and Abuse.

DOL does not propose to condition receipt of BAA–UC benefit payments on any demonstrable effort to actually spend any time with a child. How can state UI agencies or an employer possibly determine if a parent is bonding with a child consistent with the intent of the regulation? This defect would quickly result in BAA–UC being little more than a paid vacation plan. The amount of improper payments in the UI system is always a serious concern. DOL should take no action that exacerbates this problem

Conclusion.

When both UI and Social Security were created in 1935, policymakers knew there would be political pressure to use the tax revenue for other government programs. That is why they placed limits on the use of those funds. Now DOL is rushing to remove those limits by regulatory fiat. Enough time should be allowed so that such an important change can be considered carefully by Congress, governors, and the public.

With the tax burden on American jobs at a record high, the Clinton Administration has found a source of money to pay for new government programs that threatens the payment of regular UI benefits. Congress should repeal the federal unem-

ployment surtax on workers' wages, transfer the UI system to the states, and restate the historical intent of the UI program: that UI benefits should be paid only to individuals who are involuntarily out of work.

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Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

Statement of Hon. Lynn Woolsey, a Representative in Congress from the State of California

Thank you for giving me this opportunity to add my voice in strong support of the Department of Labor's proposed regulation which clarifies that States may provide unemployment benefits to new parents. I urge final adoption of the regulation.

The proposed regulation permits States to voluntarily extend their unemployment compensation programs to cover workers who take approved leave to be with newborn or newly adopted children. Implementation of a birth and adoption unemployment compensation program is entirely at the discretion of the States.

The Unemployment Insurance system is a unique federal-state partnership that sets a national floor for the benefits that States can grant, but gives States the right to provide more generous coverage if they choose. It should be left up to States to decide whether or not to provide unemployment benefits to new parents.

The nation's workforce has changed dramatically since the unemployment insurance system was started. Among the most significant changes has been the increase of women in the labor market and the dependence of most families on more than one wage earner. The proposed regulation will bring the unemployment insurance program closer to this new workforce reality.

It is important to point out that paying unemployment benefits to workers who are not immediately ready and available for work does not establish a new precedent. The proposed regulation is fully consistent with previous rulings by the Department of Labor that workers who are in training programs; workers who become ill; workers on jury duty; and workers who have been temporarily laid-off may be eligible to receive unemployment compensation under State law.

Most importantly, however, the proposed regulation is a key part of the long-term investment in families, and a family friendly workplace, that this nation must make. Research has shown how important it is to establish a strong bond between parents and their new children during their first few months of life together. Unfortunately, far too few babies in America get that kind of start. If today's children are lucky enough to have both parents living with them, chances are both work outside the home. And, its almost impossible for new parents to take time off from work without pay.

The recent tragedies in our nation's schools and communities compel all of us to ask the question, "Who is taking care of our children?"

We all know that during those critical first months, it should be the child's parents. . ..Mom and Dad. But, families are struggling to make ends meet and our children are getting left behind. The *Family and Medical Leave Act* gives parents the right to take leave when a new baby joins the family. The reality is, however, that a recent study found that nearly two-thirds of the employees who were eligible for Family and Medical Leave did not take it because they could not afford to give up their income.

New Parents Must not be Forced to Choose Between Taking Care of Their Child Financially, and Taking Care of That Child Physically and Emotionally.

Using unemployment benefits to help more American workers take care of their new children is a sound investment in the current and future workforce of this country. States that want to make that investment should be allowed to do so. Again, I urge you to adopt the proposed parental leave regulation.

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